

GAO

October 1990

Decisions of the Comptroller General of the United States

Volume 70

Pages 1-52

Current GAO Officials

Comptroller General of the United States
Charles A. Bowsher

Deputy Comptroller General of the United States
Vacant

Special Assistant to the Comptroller General
Milton J. Socolar

General Counsel
James F. Hinchman

Deputy General Counsel
Vacant

Senior Associate General Counsels
Seymour Efros
Robert P. Murphy
Richard R. Pierson
Henry R. Wray

Associate General Counsels
Barry R. Bedrick
Ronald Berger
Robert L. Higgins
Joan M. Hollenbach
Robert H. Hunter
Gary L. Kepplinger
Robert Strong
Kathleen E. Wannisky

Contents

Preface	iii
Table of Decision Numbers	v
List of Claimants, etc.	vi
Tables of Statutes, etc.	vii
Decisions of the Comptroller General	1
Index	Index-1

Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States*. The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards, pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985)), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector, whether the decision modifies, clarifies, or overrules the findings of prior published decisions, and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Preface

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 67 Comp. Gen. 10 (1987). Decisions of the Comptroller General that do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974 and Civilian Personnel Law decisions, whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

Table of Decision Numbers

	Page		Page
B-230380, October 23, 1990	50	B-239932, October 10, 1990	20
B-231370, October 18, 1990	41	B-240011, October 17, 1990	35
B-236040, October 9, 1990	16	B-240148, October 19, 1990	44
B-237783, October 1, 1990	1	B-240156, October 16, 1990	28
B-238419, October 9, 1990	17	B-240671, October 5, 1990	12
B-238463, October 15, 1990	25	B-240980.2, October 17, 1990	38
B-239880, October 4, 1990	4	B-241085, October 4, 1990	9

Cite Decisions as 70 Comp. Gen.—

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

List of Claimants, etc.

	Page		Page
Air Force, Dept. of	50	Interior, Dept. of	16
Bay Cities Services, Inc.	4	MCI Telecommunications Corporation	20
Carr, Colonel Michael L., USAF	50	N.G. Simonowich	28
Commercial Energies, Inc.	45	Navy, Dept. of	1
Defense, Dept. of	25	Navy, Dept. of	9
DynCorp	39	Nuclear Regulatory Commission	17
Government Printing Office, General Counsel	41	Nuclear Regulatory Commission, General Counsel	17
Information Handling Services	36	Swanson Typesetting Services	41
Interior, Dept. of	12		

Tables of Statutes, etc.

United States Statutes

For use only as supplement to U.S. Code citations

	Page		Page		Page
1968, Pub. L. 90-588, § 2(a), (b), 82 Stat. 1151	2	1979, Pub. L. 96-54, § 2, 93 Stat. 381	2	1989, Pub. L. 101-136, § 621, 103 Stat. 783	22
1968, Pub. L. 90-623, § 1(17), 82 Stat. 1313	2	1980, Pub. L. 96-179, 93 Stat. 1299	27	1989, Pub. L. 101-60, 103 Stat. 157	46
1970, Pub. L. 91-375, § 6(c)(18), 84 Stat. 776	2	1988, Pub. L. 100-440, § 627, 102 Stat. 1721	25		

United States Code

See also U.S. Statutes at Large

	Page		Page		Page
5 U.S.C. § 4503	16	15 U.S.C. § 637(b)(7)(B)	47	40 U.S.C. § 481(a)	48
5 U.S.C. § 5519	1	15 U.S.C. § 3301	46	40 U.S.C. § 481(a)(3)	49
5 U.S.C. § 6323	1	18 U.S.C. § 4001	21	40 U.S.C. § 486(c)	22
5 U.S.C. § 6323(a)	2	20 U.S.C. § 921	50	40 U.S.C. §§ 721-729	12
5 U.S.C. § 6323(b)	2	26 U.S.C. § 6331	42	40 U.S.C. § 751(f)	22
5 U.S.C. § 6323(c)	2	26 U.S.C. § 6331(a)	43	40 U.S.C. § 759	22
5 U.S.C. § 6323(d)	2	26 U.S.C. § 6331(b)	43	41 U.S.C. §§ 35-45	36
5 U.S.C. § 8341(a)(4)	27	26 U.S.C. § 6331(c)	43	41 U.S.C. § 35	36
10 U.S.C. §§ 1447-1455	26	26 U.S.C. § 6331(e)	43	41 U.S.C. §§ 35	45
10 U.S.C. § 1447	27	31 U.S.C. § 3302	19	41 U.S.C. § 35(a)	46
10 U.S.C. § 1447(5)	26	31 U.S.C. § 3302(b)	18	41 U.S.C. § 38	47
10 U.S.C. § 1447(5)(C)(ii)	27	31 U.S.C. § 3331	11	41 U.S.C. § 40	46
10 U.S.C. § 1450(a)	26	31 U.S.C. § 3521	11	41 U.S.C. § 351-358	36
10 U.S.C. § 2304(c)(2)	7	31 U.S.C. § 3527(a)	14	41 U.S.C. § 351	36
10 U.S.C. § 2304(e)	7	31 U.S.C. § 3527(a)(1)(B)	14	41 U.S.C. § 353	37
10 U.S.C. § 2306a	6	31 U.S.C. § 3527(a)(3)	14	41 U.S.C. § 356(5)	47
10 U.S.C. § 2306a(a)(1)(B)	7	31 U.S.C. § 3529	42	42 U.S.C. § 2011	18
10 U.S.C. § 2306a(b)(1)(A)	6	31 U.S.C. § 3529	9	42 U.S.C. § 2051(a)	18
10 U.S.C. § 2306a(c)	7	31 U.S.C. § 3551	22	42 U.S.C. § 2282	18
10 U.S.C. § 2451	36	40 U.S.C. § 472	22	42 U.S.C. § 2282(a)	19
				42 U.S.C. § 5811	18

Tables of Statutes, etc.

Published Decisions of the Comptrollers General

	Page		Page		Page
18 Comp. Gen. 155	43	60 Comp. Gen. 381	3	66 Comp. Gen. 536	17
39 Comp. Gen. 647	19	62 Comp. Gen. 75	31	66 Comp. Gen. 549	32
45 Comp. Gen. 59	49	62 Comp. Gen. 569	49	67 Comp. Gen. 27	17
51 Comp. Gen. 395	2	63 Comp. Gen. 218	33	67 Comp. Gen. 254	17
51 Comp. Gen. 506	19	63 Comp. Gen. 229	51	67 Comp. Gen. 353	19
53 Comp. Gen. 457	16	65 Comp. Gen. 508	16	68 Comp. Gen. 473	40
54 Comp. Gen. 112	14	65 Comp. Gen. 689	17	69 Comp. Gen. 238	47
57 Comp. Gen. 501	37	65 Comp. Gen. 738	16	69 Comp. Gen. 292	23
59 Comp. Gen. 96	51	66 Comp. Gen. 31	40	69 Comp. Gen. 515	40
59 Comp. Gen. 203	51	66 Comp. Gen. 192	11	69 Comp. Gen. 610	40
59 Comp. Gen. 294	19	66 Comp. Gen. 367	40		

Decisions Overruled or Modified

	Page		Page		Page
66 Comp. Gen. 31	39	66 Comp. Gen. 367	39	68 Comp. Gen. 473	39

Opinions of the Attorneys General

	Page
6 Op. Att'y Gen. 732	44

Decisions of the Court

	Page		Page		Page
<i>Aetna Insurance Co. v. United States</i> , 456 F.2d 773, 197 Ct. Cl. 713	43	<i>Boggs v. United States</i> , 44 Ct. Cl. 367	15	<i>Lanny Jones Welding and Repair Inc., In Re</i> , 106 Bankr. 446	43
<i>American Farm Lines v. Black Ball Freight Service</i> , 397 U.S. 532	11	<i>Clark, United States v.</i> , 445 U.S. 23	27	<i>MCI Telecommunications Corp. v. United States</i> , 878 F.2d 362	23
<i>Barrett v. United States</i> , 367 F.2d 834, 177 Ct. Cl. 380	43	<i>International Business Mach. Corp., United States v.</i> , 892 F.2d 1006	25	<i>Menlo Serv. Corp. v. United States</i> , 765 F.2d 805	47

Tables of Statutes, etc.

	Page		Page		Page
<i>NLRB v. Monsanto Chemical Co.</i> , 205 F.2d 763	11	<i>Studley v. Boylston Nat'l Bank</i> , 229 U.S. 523	44	<i>Udall v. Tallman</i> , 380 U.S. 1	47
<i>One Ford Coach Automobile (Motor No. 18-2396048)</i> , <i>United States v.</i> , 20 F. Supp. 44	19	<i>U.S. for Use of P.J. Keating Co. v. Warren Corp.</i> , 805 F.2d 449	43	<i>United Sand and Gravel Contractors, Inc. v. United States</i> , 624 F.2d 733	43

October 1990

B-237783, October 1, 1990

Military Personnel

Pay

■ Set-off

■ ■ Military leave

Where a statute specifically refers by section number to another statute, they are interpreted as of the time of adoption, without subsequent amendments, in the absence of a contrary legislative intent. Therefore, under the current code, the salary offset provision in 5 U.S.C. § 5519 (1988) applies to amounts received by reservists and national guardsmen while on military leave to enforce the law under 5 U.S.C. § 6323(b) (1988), but salary offset does not apply to leave under 5 U.S.C. § 6323(c) (1988) for District of Columbia National Guardsmen ordered or authorized to serve in parades or encampments even though section 5519 literally refers to section 6323(c).

Matter of: Reservists and National Guard Members—Military Leave—Salary Offset

Federal employees who are members of the Reserves of the Uniformed Services or members of the National Guard have long been entitled to specified periods of leave from their civilian employment when called to active duty for training and for certain other kinds of active duty. While on such leave they are entitled to both their military pay and their civilian salary without offset or reduction. In 1968 a statute was enacted to provide federal employees an additional 22 days of military leave if they are called to active duty to provide aid “to enforce the law.” For this type of military leave, however, a setoff of military pay was required against the person’s civilian pay for the period of leave.

Subsequently, the military leave statute, 5 U.S.C. § 6323 (1988), was amended on several occasions, without conforming amendments to the statute providing the salary offset, 5 U.S.C. § 5519 (1988). Thus, reading the current statutes literally it appears that the setoff applies only to military leave for service of District of Columbia National Guardsmen on duty for parades and encampments and not to leave for aid in law enforcement. Thus, the question arises as to whether the offset statute should be applied literally or in accordance with its original intent.¹ We reach the latter conclusion, that it should be applied to leave to enforce the law, not to leave for District of Columbia National Guardsmen on duty for parades and encampments.

¹ The question was presented by the Office of Civilian Personnel Management, Department of the Navy.

Background

Before enactment of Public Law 90-588,² section 6323 of title 5 of the United States Code contained subsections (a) and (b), which provided military leave without loss of pay for specified periods for active duty and certain training for reservists and national guardsmen who are federal employees, generally, and substitute employees in the postal field service, respectively. Public Law 90-588 added new subsections (c) and (d) providing additional leave for such employees when they perform certain military duty providing "aid to enforce the law." Section 6323(c) and (d) provided that such leave was to be without loss of or reduction in pay "except as provided by section 5519." Public Law 90-588 also added section 5519 requiring that amounts received for military service while on leave "under section 6323(c) or (d)" be credited against the employee's civilian pay.

Five days after Public Law 90-588 was enacted, Public Law 90-623 was enacted, adding a provision to section 6323 authorizing leave for employees who are D.C. National Guardsmen for service for "parades" and "encampments," when ordered or authorized under the District of Columbia Code.³ This provision was a reenactment of a similar provision which had been a part of the D.C. Code, but had been repealed. Neither the newly enacted provision nor its predecessor in the D.C. Code contained a salary offset provision, nor did the new provision refer to section 5519. This provision, however, was inadvertently enacted as a second subsection (c) of section 6323.⁴

In 1970, the Postal Reorganization Act deleted subsections (b) and (d) of section 6323 relating to postal substitute employees.⁵ This left section 6323 with subsection (a) and two subsections (c) until 1979 when Public Law 96-54 redesignated the first subsection (c) as subsection (b).⁶

Section 5519 of title 5 was left unchanged, literally applying to subsections "(c) or (d)" of section 6323. This raises the question whether salary offset applies to amounts received by reservists and guardsmen on leave to enforce the law (subsection (b)) and to D.C. National Guardsmen's service for parades or encampments (subsection (c)).

Opinion

It appears that the reference in section 5519 to "section 6323(c) or (d)" remains as the result of a technical oversight. Therefore, on the basis of the statutory history and legislative purpose of these statutes, we conclude that section 5519

² Pub. L. No. 90-588, § 2(a) and (b), 82 Stat. 1151, 1152, Oct. 17, 1968.

³ Pub. L. No. 90-623, § 1(17), 82 Stat. 1313, Oct. 22, 1968.

⁴ We have recognized that the designation of two subsection (c)'s was the result of inadvertence. B-189002, Feb. 8, 1978.

⁵ Pub. L. No. 91-375, § 6(c)(18), 84 Stat. 776, Aug. 12, 1970. The Postal Reorganization Act established a separate personnel system for the Postal Service outside the purview of many of the provisions of title 5, U.S. Code. See B-70371, Jan. 22, 1976; and 51 Comp. Gen. 395 (1972).

⁶ Pub. L. No. 96-54, § 2, 93 Stat. 381, Aug. 14, 1979.

should not be interpreted literally, but should be construed in accordance with its original purpose to apply to military leave to aid in law enforcement, currently covered by subsection (b), not to current subsection (c) of section 6323 nor to subsection (d) which has been repealed.

As enacted in 1968, section 5519 and subsections (c) and (d) of section 6323 were specific reference statutes in that each section referred specifically to the other by section number. A principle of statutory construction applicable to reference statutes provides that such statutes incorporate the provisions referred to as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention otherwise. *See Sutherland, Statutory Construction*, § 51.08 (4th Ed., 1985).

As discussed above, at the time these statutes were mutually adopted, subsections (c) and (d) of section 6323 provided employees and postal substitutes leave for reserve or national guard service to aid in law enforcement, subject to salary offset under section 5519. In the legislative history of the subsequent amendments discussed above there is no indication of an intent to make a substantive change in that regard. Therefore, the amendment redesignating the original subsection (c) as (b) should not be construed as excepting from salary offset amounts received by reservists and guardsmen on leave to enforce the law.

As to current section 6323(c), it authorizes leave for D.C. National Guardsmen performing service for parades or encampments, and is a substantial reenactment of former section 608 of title 39 of the District of Columbia Code which did not provide for or refer to another statute providing for salary offset. *See* 60 Comp. Gen. 381 (1981). We believe that if Congress intended to have salary offset apply to amounts received by D.C. National Guardsmen for service during a parade or encampment ordered or authorized under title 39, D.C. Code, it would have drafted current section 6323(c) to refer to section 5519 or at least so stated in the legislative history, which it did not. Thus, it seems clear that leave under current section 6323(c) was not intended to be subject to salary offset under section 5519 and should not be so construed.⁷

⁷ In an FPM Letter, OPM stated that 5 U.S.C. § 5519 provides for offsets from amounts received during leave under both subsections (b) and (c) of section 6323 as currently codified. Answer to Question No. 17 in FPM Letter 630-30, Apr. 23, 1982. However, by letter of April 3, 1990, OPM advised that it now believes that the salary offset provisions of 5 U.S.C. § 5519 do not apply to D.C. National Guardsmen under the circumstances described in 5 U.S.C. § 6323(c).

B-239880, October 4, 1990

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Competition rights

■ ■ ■ Contractors

■ ■ ■ ■ Exclusion

Protest by incumbent contractor challenging its exclusion from a limited competition for an interim contract for waste collection and disposal services is sustained where contracting agency failed to obtain maximum practicable competition by not inviting protester to respond to solicitation on the basis that the solicitation required submission of supporting cost data with proposals and protester had been unwilling to provide such data when offered an extension to its then-current contract to cover these services. The agency's exclusion of the contractor on this basis is unreasonable since such data would not have been required if adequate price competition were achieved.

Matter of: Bay Cities Services, Inc.

Timothy H. Power, Esq., for the protester.

Vasio Gianulias, Esq., Department of the Navy, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Bay Cities Services, Inc. protests its exclusion from the limited competition conducted pursuant to request for proposals (RFP) No. N68711-90-R-5647, issued by the Navy Public Works Center, Department of the Navy, San Diego, California, for solid waste collection and disposal for a 4-month period at various Navy facilities in the San Diego area. Only two potential sources were solicited based on the Navy's determination of unusual and compelling urgency for these services; only one of those sources submitted a proposal. That offeror, U.S. Disposal Services, was awarded the contract. Bay Cities, the previous contractor providing these services, argues that it was improperly excluded from the solicitation process and thereby excluded from submitting a proposal under the solicitation.

We sustain the protest.

Background

The procurement challenged by Bay Cities resulted in a 4-month interim contract awarded on May 21, 1990, by the Navy on an urgent basis to assure uninterrupted waste collection and disposal services for several Navy facilities in the San Diego area. The previous full-term contract for these services expired on March 31, and included a full range of facility maintenance services, such as custodial and grounds maintenance, as well as solid waste disposal and collection services for the Navy. Bay Cities performed the waste collection and dispos-

al services portion of that full-term facilities maintenance contract as a subcontractor to the prime contractor.

During March 1990, when the Navy became aware that it would not have a new contractor in place prior to October 1, the agency conducted a limited competition for its facility maintenance services for the 6-month period—April 1 to September 30—during which the Navy would have no coverage. The solicitation for this 6-month “bridge contract” permitted companies to respond to any or all of several line items for the different services included within the facility maintenance services contract.

Bay Cities was the only company responding to the solicitation for a 6-month interim contract that offered to provide the waste collection and disposal services. However, the Navy declined to accept Bay Cities’ offer because its price, approximately \$90,000 per month, exceeded the government estimate by 17 percent, and exceeded Bay Cities’ previous price for the same services by nearly 35 percent. In addition, Bay Cities refused to provide a price breakdown in support of its offer.

The Navy next redesignated the waste collection and disposal services as a separate solicitation apart from the larger facilities contract, and requested that Bay Cities submit a best and final offer (BAFO) along the lines of its initial submission in response to the facilities management services solicitation. For this solicitation, Bay Cities was asked to provide prices for 1-, 2- and 6-month periods. Bay Cities offered the same price as before for a 1- or 2-month contract, and a slightly lower price for a 6-month contract. Although unsatisfied with Bay Cities’ price, the Navy awarded the company a 2-month interim contract to cover the agency’s immediate need for waste collection and disposal, and continued its attempts to obtain limited competition for the remaining 4-month period.

After conducting an extensive market survey of sources for the remaining 4-month period and locating only two potential sources, the Navy asked Bay Cities to submit a proposal for a 4-month extension of its 2-month contract. The Navy also requested that Bay Cities submit, along with its proposal, cost data on a standard form (SF) 1411. Although Bay Cities provided a proposal to the Navy, it did not provide data in support of its price, and did not complete the SF 1411. Despite several requests by contracting officials for the cost information, and despite warnings that its contract would not be extended without such data, Bay Cities refused to provide the cost data. As a result, the Navy refused to consider Bay Cities’ proposal and did not extend its 2-month contract.

On May 11, the two companies identified by the market survey as potential sources were given copies of a solicitation for the waste collection and disposal services covering the 4-month period of June 1 to September 30. The solicitation, RFP No. N68711-90-R-5647, was a copy of Bay Cities’ 2-month interim contract. The Navy invited both companies to submit a proposal and requested that any offer be accompanied by cost data, set forth on SF 1411. Only one of

the companies, U.S. Disposal, submitted an offer; it also provided the requested SF 1411. On May 21, the Navy awarded the contract to U.S. Disposal; on May 30, Bay Cities protested to our Office.

Arguments

Bay Cities protests that the Navy improperly excluded it from the solicitation process resulting in award to U.S. Disposal in violation of the Competition in Contracting Act of 1984 (CICA). The protester argues, in essence, that the Navy barred it from competing for the 4-month interim contract because Bay Cities refused to provide SF 1411 cost information either in response to the solicitation for a 6-month interim contract, or in response to the discussion regarding an extension to Bay Cities' 2-month interim contract in progress at the time.¹ According to Bay Cities, it would have submitted a proposal if solicited, and the resulting competition would have negated any need for providing cost data, since adequate price competition would have existed.

The Navy responds that it had already solicited Bay Cities twice for the services covered by this procurement, and that it reasonably concluded that the protester was not an available source for this urgent requirement. According to the Navy, it is irrelevant that previous attempts to obtain cost data from Bay Cities were made under different solicitations and contracts, since all three contract actions—the solicitation for a 6-month interim contract, the aborted attempt to extend Bay Cities 2-month contract, and the solicitation for a 4-month contract—were for the same services, with the same terms, and for essentially the same time period. The Navy claims that since it wanted cost data from offerors, and since Bay Cities had already refused to provide such data, the Navy was justified in excluding Bay Cities from the limited competition for the 4-month interim contract.

As explained in detail below, we believe the Navy erred in excluding Bay Cities from the limited competition for the 4-month interim waste collection and disposal contract.

Analysis

The dispute that led to both this procurement and this protest springs from the Navy's attempt to obtain cost data and Bay Cities' refusal to provide it. Submission of cost or pricing data is mandated by the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988), for all negotiated contracts, or modifications to contracts, in excess of \$100,000, except in certain circumstances. The Act does not require that agencies obtain such data for contracts awarded with "adequate price competition," 10 U.S.C. § 2306a(b)(1)(A); Federal Acquisition Regulation (FAR) § 15.804-3(b); however, agencies are granted the discretion to request such data

¹ Bay Cities' refusal to submit the requested cost data was based on its claim that it did not keep sufficiently detailed records to complete the SF 1411, and that the effort and potential liability of providing such data outweighed the benefit of a 4-month contract for these services.

when the agency determines the information is necessary to assure that prices are reasonable. 10 U.S.C. § 2306a(c); FAR § 15.804-2(a)(2). When a requirement for such data is included in a solicitation we have held that a contractor's failure to provide cost data may be waived as immaterial if the contracting officer concludes that the solicitation generated adequate price competition. See *Contract Servs., Inc.*, B-232689, Jan. 23, 1989, 89-1 CPD ¶ 54. The SF 1411, mentioned above, is the form used for the submission of such data.

When Bay Cities refused to provide the Navy with cost data to support a 4-month extension of the company's 2-month contract, the Navy properly refused to extend the existing contract. Awarding a contract modification of this magnitude, without obtaining such data, would have violated the terms of the Truth in Negotiations Act. 10 U.S.C. § 2306a(a)(1)(B). On the other hand, we do not agree with the Navy's assertion that Bay Cities' refusal to provide such information justified excluding the company from the limited competition that followed.

Under CICA, an agency may use other than fully competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2). Here, we agree with, and the protester does not challenge, the Navy's determination that protecting public health created an urgent need to ensure uninterrupted collection and disposal of solid waste at Navy facilities. However, the authority to limit competition does not automatically justify a sole-source award. Rather, agencies are required, by 10 U.S.C. § 2304(e), to request offers from as many potential sources as practicable under the circumstances.

The statutory framework of CICA requires that even though the Navy determined urgent circumstances justified limiting competition, it still must compete its needs to the maximum extent practicable. *Servrite Int'l, Ltd.*, B-236606, Dec. 6, 1989, 89-2 CPD ¶ 520. We have sustained challenges to such limited competitions, where the existence and capability of an excluded potential source was clearly known to agency contracting officials by virtue of the source's prior performance of the same services, and the agency did not adequately justify the contractor's exclusion from the competition. See *Earth Property Servs., Inc.*, B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273, *aff'd*, B-237742.2, June 11, 1990, 90-1 CPD ¶ 546; *Fairchild Weston Sys., Inc.*, B-225649, May 6, 1987, 87-1 CPD ¶ 479. In this case, the Navy solicited the two potential sources obtained from its market survey, but did not solicit the contractor currently performing the needed services. This omission occurred not because the agency was unaware of Bay Cities' willingness to perform the services—whenever asked, Bay Cities provided a proposal—but because Bay Cities represented that it was unwilling to provide supporting cost data for a 4-month contract.

The Navy argues Bay Cities indicated it had no interest in the 4-month interim procurement. The Navy claims that when it pressed Bay Cities for cost data while considering an extension to the company's contract, Bay Cities' president

responded that providing the data “was not worth the effort, that he would take his containers and bid the three year contract when it was advertised, and that the government could get someone else to do the work.” Both the Navy and Bay Cities submitted sworn statements regarding this alleged comment; however, even if we assume the comment was made exactly as portrayed by the Navy, it does not justify excluding Bay Cities from the limited competition that followed. Bay Cities’ consistent complaint, and the thrust of the comment to Navy officials (quoted above from Navy documents), is that it did not want to provide cost data. There is no doubt that the company would willingly perform the needed services if awarded the contract.

We recognize that even if solicited for the 4-month interim contract, it is not likely that Bay Cities would have provided cost data as requested. However, there is the possibility that adequate price competition would have been achieved with the submission of offers from both Bay Cities and U.S. Disposal. In that case, the Navy could have waived the requirement for such data—even if the requirement was included in the solicitation and one offeror provided the information and the other did not. *Contract Servs., Inc.*, B-232689, *supra*. In the event that the Navy continued to require such data as authorized in the procurement regulations, it could have rejected Bay Cities’ offer, and instead selected the lowest-priced offeror complying with the requirement for cost data. *Id.* For these reasons, it was not reasonable for the Navy to exclude Bay Cities from the limited competition on the basis that the company had refused to provide cost or pricing data in response to previous solicitations and requests for such data.

Recommendations

Because contract performance continued in the face of Bay Cities’ protest due to urgent and compelling circumstances, and the interim contract here is nearly completed, it is not practical to recommend that the Navy resolicit this requirement. Since the protest is sustained, we find that Bay Cities is entitled to the costs of filing and pursuing its protest, including attorneys’ fees. *Earth Property Servs., Inc.*, B-237742, *supra*. The protester should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e) (1990).

The protest is sustained.

B-241085, October 4, 1990

Appropriations/Financial Management

Accountable Officers

■ **Disbursing officers**

■ ■ **Substitute checks**

■ ■ ■ **Issuance**

■ ■ ■ ■ **Authority**

The Navy has authority to waive its requirement to obtain written statements of nonreceipt from check payees before issuing successor checks. The delay in waiting for such statements will likely cause financial hardship to allotment payees. Therefore, under the circumstances in this case, a Navy Disbursing Officer's issuance of successor checks without first obtaining signed statement from original checks payees is not evidence of a lack of due care.

Appropriations/Financial Management

Accountable Officers

■ **Disbursing officers**

■ ■ **Relief**

■ ■ ■ **Illegal/improper payments**

■ ■ ■ ■ **Substitute checks**

When an accountable officer is issuing 4,671 replacement checks because the original checks were lost in a bulk shipment, it is premature to request relief, in advance, for any loss due to payment of both original and substitute checks. First, we cannot grant relief until a loss occurs. Second, any loss might be recovered by collection action or through a claim under the Government Losses in Shipment Act. A loss must occur and the factual record must be complete before we will address relieving liability.

Matter of: Department of Navy

This responds to your August 23, 1990, request for an advance decision under 31 U.S.C. § 3529 (1988) on two questions. First, you ask whether certain U.S. Navy regulatory requirements for issuing successor checks may be waived for U.S. Navy allotment checks lost in transit to the Philippines. Second, you ask us to grant relief in advance to a Disbursing Officer at the Navy Finance Center in Cleveland, Ohio, for any loss that may occur if both original and successor checks are negotiated. For the reasons stated below, we conclude (1) that the Navy may waive its requirement to obtain signed statements from each allotment payee before issuing a successor check, and (2) that while the record before us does not indicate any lack of due care, it is premature to grant relief for possible future losses.

Background

Your submission indicates that on August 7, 1990, the U.S. Embassy in the Philippines informed the Navy Finance Center in Cleveland, Ohio, that one of the three boxes containing U.S. Navy checks for August 1990 civilian allotment pay-

ments had not been received. This box contained 4,671 checks with a total value of \$552,345.45. The record indicates that the Finance Center transports these checks in bulk each month to the U.S. Embassy, and that Embassy officials then turn the checks over to the Philippine postal system for delivery to the individual payees.

The record also indicates that Finance Center and Embassy officials have taken steps to determine whether the checks were lost in transit or actually were delivered to the allotment payees. The Finance Center asked the Embassy to contact 17 randomly selected allotment payees to determine if they received the August 1990 checks. The Embassy has indicated that contacting the allotment payees is difficult because of the effects of the recent earthquake, heavy rains, and restrictions on travel due to political unrest in the Philippines. However, some payees initiated contact with the Embassy to report that they had not received their August allotment checks. In addition, your office has advised us that since your submission, the Navy has submitted to Treasury an SF 1184, Unavailable Check Cancellation, for each of the checks, and has been advised by Treasury that none of the checks have been presented for payment.

The Finance Center sent letters to all the payees advising them that they must submit to the U.S. Embassy a written certification that they have not received their August 1990 allotment checks before they will be issued successor checks. This action was based upon a provision of the Navy Comptroller Manual which states that "[u]nder all circumstances, the disbursing officer must obtain a statement, in writing, from the payee prior to issuing a replacement or successor check." Vol. 4 Navy Comptroller Manual, para. 04040602. However, because the Finance Center believes there is sufficient justification to support the conclusion that the original checks were lost and not received by the intended payees, and distance and communication difficulties will create hardships if successor checks are not issued until claimant statements are received, your office has waived the requirement in this case. Since the Disbursing Officer at the Navy Finance Center "will not provide carte blanche issuance of successor checks to the payees" without approval from our Office, you requested our advance decision as to whether that waiver is proper.¹ You also asked our Office to grant advance relief to the Disbursing Officer if both original and successor checks are negotiated.

Legal Discussion

Before deciding whether the Navy may waive the requirement to obtain statements from payees prior to issuing successor checks, we must consider whether the requirement is implemented by the Navy itself or is imposed upon the Navy by some other authority. The Navy could not waive a requirement properly imposed upon it by some other agency. In this regard, we note that the 31 U.S.C.

¹ We understand that since your submission over 2000 checks have been issued to claimants who notified the Embassy that original checks were not received and submitted the required statements. Accordingly, your request pertains only to successor checks issued to the remaining payees who have not submitted the required statements.

§ 3331 (1988) gives the Secretary of the Treasury the authority to issue "substitute checks" when "original checks" are lost. However, section 3331 also empowers Treasury to delegate its authority under whatever conditions the Secretary prescribes. Thus, we must determine whether Treasury has delegated this authority to the Navy, and whether that delegation includes a requirement to obtain statements from payees in advance of issuing replacement checks.

Beginning January 1, 1984, Treasury instituted new procedures for issuing replacement checks under 31 U.S.C. § 3331. Instead of Treasury reissuing old checks (i.e., producing a check bearing the same check symbol and serial number as the original check), agencies now "recertify" payments. Treas. Fiscal Requirements Manual Bulletin No. 83-28, Aug. 2, 1983 and 54 Fed. Reg. 35,647 (1989). These recertifications result in new checks being issued to the same payee as the lost original check. *Id.* As a non-Treasury disbursing agency under 31 U.S.C. § 3521, the Navy issues these new checks pursuant to "recertifications" made by Navy officials. Navy Comptroller Manual, para. 04090603; see also T.F.R.M. Bull. No. 82-27, Sept. 30, 1982, 54 Fed. Reg. 35,647, and 66 Comp. Gen. 192 (1987). Thus, the Navy is authorized by Treasury to issue successor checks.

Treasury's regulations governing the issuance of replacement checks encourages, but does not require, that a signed statement be obtained in advance. "In each case where a claim is proper, based on records in the agency, a personally signed statement should be obtained for the agency's records." Treas. Finance Manual, Vol. 1, § 4-7060.20. Thus the requirement to obtain a written statement in advance is imposed by the Navy, not by the Treasury Department.

The U.S. Supreme Court has stated that as a general principle,

it is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970), quoting *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953). The Navy requirement for statements in advance is adopted for the orderly transaction of business in issuing replacements for lost checks.

Thus, we agree that the Navy has the authority to waive its requirement for claimant statements before successor checks are issued. Further, we do not disagree with Navy's determination that the waiver is appropriate in this case. The circumstances here fit within other criteria specified in both the Treasury and Navy regulations which indicate that successor checks should be issued expeditiously. For example, both regulations state that recipients of recurring payments (which may be offset against any overpayments) are low-risk situations for issuing replacement checks. 1 T.F.M. § 4-7060.20e; Vol. 4 Navy Comptroller Manual, para. 040603. Moreover, we have no reason to question the Navy's determination that contacting all 4,671 payees will take some time because of the current difficulties in reaching people in the Philippines, and that waiting for signed statements in advance from all the payees is likely to cause delay and

hardship. Therefore, we will not consider the Disbursing Officer's issuance of successor checks without first obtaining signed statements from claimants to be a lack of due care in this case. *Contra* B-223932, Mar. 27, 1987 (issuance of a second check without obtaining a statement of the claimant as required by agency regulations showed a lack of due care).

In regard to your request that we grant the Disbursing Officer at the Navy Finance Center advance relief for any overpayments which may occur because both original and successor August 1990 allotment checks are cashed, we consider the request to be premature. Inherently, we cannot grant relief to an accountable officer for a loss until the loss occurs. 66 Comp. Gen. 192 (1987). If there is a loss in the future, it may very well be recovered by collection action, making a request for relief unnecessary. Furthermore, since the original checks were apparently lost in bulk transit to the U.S. Embassy, the Navy may seek to take advantage of the claims provisions in the Government Losses in Shipment Act, 40 U.S.C. §§ 721-729 (1988), and its implementing regulations, 31 C.F.R. Parts 361 and 362 (1989). Therefore, while the record before us does not indicate any lack of due care, we will not grant relief for any future losses until such losses occur and the factual record is complete.

B-240671, October 5, 1990

Appropriations/Financial Management

Accountable Officers

■ Cashiers

■ ■ Relief

■ ■ ■ Physical losses

■ ■ ■ ■ Theft

Relief for the physical loss of funds due to theft is denied imprest fund cashier under 31 U.S.C. § 3527(a) (1988). The cashier failed to follow regulations requiring that the safe combination and key be stored in a secure manner, and thus was negligent. The evidence does not support a determination that the cashier's negligence did not contribute to the theft.

Matter of: Department of Interior

This responds to your request of August 1, 1990 that we relieve Ms. Evelyn Hamakawa (imprest fund sub-cashier, Bureau of Reclamation) for the loss of \$1,458.27 in imprest funds. For the reasons stated below, relief is denied.

Background

Based on your submission, and supplemental information provided in response to our inquiries, the facts are as follows. In October 1987, Ms. Hamakawa was the imprest fund sub-cashier and Ms. Rita Nelson was the alternate sub-cashier at the Bureau of Reclamation's Division of Procurement and Contracts, Mid-Pa-

cific Region. The two cashiers worked out of separate cash boxes with different combinations known only to the appropriate cashier. The two cash boxes were stored in the bottom drawer of a two drawer safe located beside Ms. Hamakawa's desk. Both drawers were secured by a combination lock located on the top drawer. The bottom drawer was also secured by a hasp and keyed padlock. Thus, even after the combination was executed, the bottom drawer could not be opened without unlocking the padlock. The two cashiers were the only officials with access to the safe.

At approximately 4:15 p.m. on October 6, 1987, Ms. Hamakawa placed her cash box in the bottom drawer of the safe behind that of Ms. Nelson. Shortly thereafter, Ms. Hamakawa spun the combination on the top drawer, placed the padlock on the bottom drawer of the safe, and left the office for the evening. According to officials familiar with the case, Ms. Hamakawa was the last person to use the safe on that day. When executing the safe combination on the morning of October 7, 1987, Ms. Nelson noticed that the position of the combination dial was unusual and that the lever on the front of the dial had been twisted. However, both the top and bottom drawers were locked and the padlock on the bottom drawer did not appear unusual. Ms. Nelson opened the bottom drawer, removed her cash box, and closed and locked the drawer. She did not recall seeing Ms. Hamakawa's cash box in the drawer. Between 1:00 and 2:00 p.m. on October 7, Ms. Hamakawa opened the bottom safe drawer and discovered that her cash box was missing.

The Federal Bureau of Investigation (FBI) and the Federal Protective Service (FPS) jointly investigated this matter. According to the FBI report dated March 24, 1988, the investigation did not reveal sufficient information to identify a subject or to seek a prosecutive opinion. The FPS terminated its investigation as a result of the FBI report. You have determined that the loss was not the result of negligence by Ms. Hamakawa.

Discussion

We concur in Interior's characterization of the loss as a theft. Ms. Hamakawa's entire cash box was removed from the safe. Although there is no evidence of forced entry, there is evidence that the combination on the safe was executed during non-business hours between October 6 and October 7, 1987. The fact that Ms. Nelson discovered the unusual condition of the combination on the morning of October 7, 1987 suggests that a theft occurred during non-business hours between October 6 and October 7, 1987, rather than on October 7, 1987, between 10:00 a.m. when Ms. Nelson retrieved her cash box, and 1:00 p.m. when Ms. Hamakawa discovered her cash box missing. In addition, according to agency officials familiar with the case, Ms. Nelson closed and locked the safe after removing her cash box from the bottom drawer, and we understand that Ms. Hamakawa and Ms. Nelson generally placed the padlock on the bottom drawer of the safe during the day when cash boxes were inside, even though the combination had been activated. The fact that the bottom drawer, if not the entire safe,

was locked between 10:00 a.m. and 1:00 p.m. on October 7, 1987, further suggests when the theft occurred.

An accountable officer is held to a high standard of care with respect to funds with which the officer is charged and is automatically liable at the moment a physical loss occurs. 54 Comp. Gen. 112 (1974); B-217945, July 23, 1985. Under 31 U.S.C. § 3527(a) (1988), this Office is authorized to relieve accountable officers of liability for a physical loss of government funds if we concur in the determination of the head of the agency that: (a) the loss occurred while the officer was carrying out his official duties and (b) that the loss was not the result of fault or negligence on the part of the officer. When a loss of funds occurs, the accountable officer is presumed negligent and, to obtain relief, must rebut this presumption with convincing evidence that the loss was not caused by the accountable officer's negligence or lack of reasonable care. *Id.* Accordingly, we ordinarily will deny relief under section 3527(a) when the record contains only conclusory statements but no actual evidence that the accountable officer acted with reasonable care. Stated differently, a mere administrative determination, unsupported by evidence, that there was no fault or negligence is not sufficient to rebut the presumption of an accountable officer's negligence. B-209569, April 13, 1983.

Nevertheless, in losses involving theft, we generally grant relief if the evidence presented shows that the theft cannot be attributed to fault or negligence on the part of the accountable officer on the ground that such evidence rebuts the presumption of negligence. *See* B-217945 at 2; B-212605, April 19, 1984. However, the supplemental information provided in response to our inquiries clearly shows that Ms. Hamakawa failed to comply with applicable regulations and was negligent in protecting the combination and key that would allow unauthorized persons to gain access to the safe's contents. Thus, based on the record before us, we are unable to conclude that the theft cannot be attributed to Ms. Hamakawa's negligence. *See* 31 U.S.C. § 3527(a)(1)(B), (3).

Where regulations govern the activities of an accountable officer, the exercise of reasonable care entails following those regulations and the failure to follow the regulations constitutes negligence. 54 Comp. Gen. at 116. The Manual of Procedures and Instructions for Cashiers issued by the Department of Treasury in July 1985 prescribes various types of containers for the storage of cash and provides that the combination and a duplicate key to the cash box should be placed in a sealed envelope, which should be signed and dated. The envelope should be placed in a safe controlled by an appropriate official, such as the administrative or security officer.

Your submission of August 1, 1990, did not address the degree of care that Ms. Hamakawa exercised over her key to the padlock and the combination to the safe. However, the record before us reveals that Ms. Hamakawa did not follow the applicable regulations pertaining to the storage of combinations and keys and was, therefore, negligent. Ms. Hamakawa kept a copy of the combination to the imprest safe from which her cash box was stolen taped to the underside of the pull-out panel on her desk. Further, Ms. Hamakawa and Ms. Nelson both

placed their keys to the padlock in or on their desks each evening. Ms. Nelson stored her key on the top of her desk under some envelopes and Ms. Hamakawa stored her key in the back of her top center desk drawer which did not lock. *See also* B-193416, Oct. 25, 1979; B-185666, July 27, 1976; B-182480, Feb. 3, 1975 (holding that an accountable officer's failure to store keys or combinations in a secure manner in accordance with applicable guidance constitutes negligence).

In light of Ms. Hamakawa's failure to properly safeguard the combination and key to the safe, we cannot relieve Ms. Hamakawa absent exculpatory evidence that the theft was not attributable to Ms. Hamakawa's negligence. *See* B-185666 (granting relief to an accountable officer who had improperly stored combinations and the keys to cash boxes in a sealed envelope in an unlocked desk drawer on the ground that, as the seal on the envelope was intact subsequent to the discovery of the loss, the thief had not used the improperly stored combinations and keys to obtain the missing funds). The record indicates no evidence of forcible entry, and thus raises the possibility that the thief gained access to Ms. Hamakawa's cash box with the improperly stored combination and key. Absent exculpatory evidence to that effect, we are unable to conclude that the theft was not attributable to Ms. Hamakawa's negligence or that Ms. Hamakawa has been proven faultless with respect to the loss. *See* 54 Comp. Gen. at 115 (quoting *Boggs v. United States*, 44 Ct. Cl. 367 (1909)); B-182480 (denying relief where a thief apparently unlocked a file cabinet with the key that was improperly stored in the accountable officer's unlocked desk).

We have granted relief where more than one person had access to the safe in which cash boxes were kept on the ground that definite placement of responsibility for the loss in such cases is precluded. *See, e.g.*, B-217945 at 3. However, we do not believe that such cases provide a basis for relief in this case. While both Ms. Hamakawa and Ms. Nelson improperly safeguarded the keys to the safe, Ms. Hamakawa unlike Ms. Nelson stored the safe's combination where it was accessible to unauthorized persons.

Based on the present record, we find that Ms. Hamakawa was negligent. Further, the evidence before us does not support a determination that her negligence did not contribute to the physical loss of \$1,458.27. Accordingly, relief is denied.

B-236040, October 9, 1990

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
 - ■ Necessary expenses rule
 - ■ ■ Awards/honoraria
-

Appropriations/Financial Management

Appropriation Availability

- Purpose availability
- ■ Specific purpose restrictions
- ■ ■ Meals

Employees attending regional awards ceremony sponsored by the local Federal Executive Board may be reimbursed the cost of the luncheon and related expenses under the Incentive Awards Act.

Matter of: Career Service Awards Program

The issue in this decision is whether an agency may pay the fee charged for those employees attending a regional awards ceremony and luncheon sponsored by a local Federal Executive Board.¹ For the reasons that follow, we conclude that the fee may be paid by the agency.

In May 1989, the Pittsburgh Federal Executive Board sponsored an awards ceremony to recognize certain federal employees for outstanding achievement in their respective fields. The Board charged \$13 per person to cover the costs of the plaques, recognition awards, and lunch for the participants. The Bureau of Mines asks whether the agency employees, who were nominated by their agencies for these awards, along with their supervisors or managers may be reimbursed the fee for attending this ceremony as a "necessary expense" under the Incentive Awards Act, as interpreted in our decision in 65 Comp. Gen. 738 (1986).

Opinion

As a general rule, an employee may not be paid a per diem allowance or actual subsistence expenses for meals or lodging expenses at the permanent duty station as such expenses are considered personal to the employee. *J.D. MacWilliams*, 65 Comp. Gen. 508 (1986); 53 Comp. Gen. 457 (1974). However, the Incentive Awards Act authorizes an agency head to pay a cash award and incur necessary expenses for the honorary recognition of employees who meet the stated criteria for such awards. 5 U.S.C. § 4503.

In 65 Comp. Gen. 738 (1986), we held that the cost of refreshments could be provided from the agency's operating appropriations as a "necessary expense"

¹ This decision was requested by Dennis A. Sykes, Chief, Division of Finance, Bureau of Mines, Department of the Interior.

under 5 U.S.C. § 4503 where the agency determines that a reception with refreshments, in accordance with Office of Personnel Management regulations, would materially enhance the effectiveness of its awards ceremony. *See also* B-167835, Nov. 18, 1969, involving the cost of an awards banquet and 66 Comp. Gen. 536 (1987) involving an awards ceremony reception with refreshments.

The awards in this case were not made by the Bureau of Mines and the awards ceremony was not conducted by the Bureau of Mines. However, the awards were based on nominations submitted by each agency in the Pittsburgh area to an interagency coordinating group² and were designed to recognize the employees of those agencies. Thus, in view of our decision in 65 Comp. Gen. 738, we believe the fee charged in connection with the attendance of nominees, award recipients, and supervisors or managers at that ceremony falls within the scope of the Incentive Awards Act.³

Accordingly, we conclude that the agency may reimburse those employees who attended the ceremony for the cost of attendance.

B-238419, October 9, 1990

Miscellaneous Topics

Environment/Energy/Natural Resources

■ **Regulatory agencies**

■ ■ **Authority**

■ ■ ■ **Civil penalties**

■ ■ ■ ■ **Mitigation**

The Nuclear Regulatory Commission (NRC) lacks authority to permit licensees who violate NRC requirements to fund nuclear safety research projects in lieu of paying monetary civil penalties. *See* 42 U.S.C. § 2282(a).

Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties

This responds to a request from the General Counsel, Nuclear Regulatory Commission (NRC), regarding the Commission's authority to mitigate civil penalties levied against licensees who violate NRC requirements. The General Counsel asks whether NRC may permit a licensee, in lieu of paying a penalty, to fund nuclear safety research projects at universities or other nonprofit institutions. We conclude that NRC has no authority to mitigate penalties in such a manner.

² Federal Executive Boards are interagency coordinating groups which rely on voluntary participation by its members and which are subject to the oversight of the Office of Personnel Management. *See* 67 Comp. Gen. 27 (1987); 65 Comp. Gen. 689 (1986).

³ Such reimbursement would not appear to conflict with the prohibition on interagency financing of boards or commissions. *See* 67 Comp. Gen. 254 (1988); 67 Comp. Gen. 27 (1987).

Background

Pursuant to the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5811, the NRC carries out an enforcement program to promote and protect the radiological health and safety of the public. Section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2282, authorizes the NRC to impose civil penalties, not to exceed \$100,000 per violation per day, for the violation of certain specified licensing provisions of the act, rules, orders, and license terms implementing these provisions, and for violations for which licenses can be revoked. Section 234 also authorizes the NRC to “mitigate” such penalties.

In this regard, the NRC proposes to “mitigate” civil penalties by permitting violators to fund nuclear safety research projects. The NRC notes that it has authority under section 31 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2051(a), to award contracts to nonprofit educational institutions to conduct nuclear safety-related research. As part of an effort to expand its research program, the NRC asks whether it has authority, without further legislation, to implement any of the following options:

- The NRC would accept “contributions” from a violator, in lieu of a civil penalty, for use by the NRC Office of Research to fund research grants to universities and other nonprofit institutions. Currently, the NRC deposits in the Treasury penalties paid to it by licensees. See 31 U.S.C. § 3302(b) (1982).

- In lieu of paying a civil penalty, the violator would agree to contribute the amount of the penalty, or a portion thereof, directly to a university or nonprofit institution to fund a research project competitively selected by the Office of Research.

- In lieu of paying a civil penalty, the violator would agree to contribute the amount of the penalty, or a portion thereof, to a university to fund a research project selected by the violator.

As a general matter, NRC states that the contributions under each of these three options would be treated as fines for Internal Revenue Code purposes and not as charitable contributions.

Discussion

In a 1983 decision, we concluded that the Commodity Futures Trading Commission (CFTC) lacked authority to adopt an enforcement scheme similar to that proposed by NRC. B-210210, Sept. 14, 1983. CFTC had proposed that in lieu of imposing a monetary civil penalty, it might accept, as a remedy for violating the Commodity Exchange Act, a promise from the violator to make an educational donation. We noted that although the Congress empowered the CFTC with discretion in enforcing that act, the Congress specifically defined the remedies available to the CFTC. We determined that CFTC’s discretion did not extend to remedies, such as that proposed by CFTC, that are not within the

ambit of CFTC's statutorily authorized prosecutorial objectives, i.e., correction or termination of a condition or practice, punishment, and deterrence.

For similar reasons, we conclude that NRC is not authorized to impose its proposed alternative punishment. As we pointed out in the CFTC decision, an agency's authority is limited to the powers delegated to it by the Congress. The Congress, in section 234, has specifically defined NRC's enforcement authority as follows:

[a]ny person who (1) violates any licensing provision, . . . or any rule, regulation, or order issued thereunder, or any term, condition or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked . . . , shall be subject to a civil penalty, to be imposed by the Commission, of not to exceed \$100,000 for each such violation.

42 U.S.C. § 2282(a). By its terms, section 234 authorizes the NRC to impose civil monetary penalties.

Section 234 also provides that "the Commission shall have the power to compromise, mitigate, or remit" such penalties. *Id.* Clearly, this authority confers discretion. "Mitigate," for example, means "to make less severe; to alleviate; to diminish." *United States v. One Ford Coach Automobile (Motor No. 18-2396048)*, 20 F. Supp. 44, 46 (W.D. Va. 1937). Thus, with authority to compromise, mitigate or remit, NRC may adjust the penalty to reflect the special circumstances of the violation or concessions exacted from the violator.

Such discretion, however, like CFTC's prosecutorial discretion, does not empower the NRC to impose punishments unrelated to prosecutorial objectives. *See* B-210210, Sept. 14, 1983. Under NRC's proposal, a violator would contribute funds to an institution that, in all likelihood, has no relationship to the violation and has suffered no injury from the violation.

From an appropriations law perspective, such an interpretation would require us to infer that the Congress intended to allow the NRC to circumvent 31 U.S.C. § 3302 and the general rule against augmentation of appropriations. Section 3302(b) requires the NRC to deposit into the Treasury as miscellaneous receipts moneys collected under section 234. Section 3302(b) provides that

. . . an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable

31 U.S.C. § 3302(b). *See, e.g.*, 39 Comp. Gen. 647, 649 (1960).

The purpose of section 3302(b) is to ensure that the Congress retains control of the public purse, and to effectuate Congress' constitutional authority to appropriate moneys. *See, e.g.*, 67 Comp. Gen. 353, 355 (1988); 51 Comp. Gen. 506, 507 (1972). Each of the three proposals identified by the NRC would result in an augmentation of NRC's appropriations, allowing the NRC, in varying degrees, to control, in circumvention of the congressional appropriations process, the amount of funds available for nuclear safety research projects. *See* 59 Comp. Gen. 294, 296 (1980); B-210210, Sept. 14, 1983. We are unwilling to interpret "compromise, mitigate, or remit" in such a manner where neither the language

of section 234 nor its legislative history provides any basis for such an interpretation.

Accordingly, we do not read section 234 as authorizing the NRC to implement any of the three options proposed. If NRC believes such authority is important to its operations or the amount of funding for such purposes is inadequate, it should submit a legislative proposal to the Congress either to amend section 234 or to increase its appropriation for its nuclear safety research program.

B-239932, October 10, 1990

Procurement

Contract Management

- **Contract modification**
- ■ **Cardinal change doctrine**
- ■ ■ **Criteria**
- ■ ■ ■ **Determination**

Procurement

Special Procurement Methods/Categories

- **Service contracts**
- ■ **Telecommunications**

Requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts. Where the long distance service does not differ in any technical respect from that being provided under the FTS2000 contracts, the contracts specifically provide for additional users, and the contracts cover telephone services related to official government business, including telephone calls by inmates.

Procurement

Contract Management

- **Contract modification**
- ■ **Cardinal change doctrine**
- ■ ■ **Criteria**
- ■ ■ ■ **Determination**

Where agency requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts, agency is required to place orders for the service under the FTS2000 contract in the absence of an exception granted by the General Services Administration and such orders will not constitute improper sole-source procurements.

Matter of: MCI Telecommunications Corporation

William A. Roberts III, Esq., and Lee P. Curtis, Esq., Howrey & Simon, for the protester.

George J. Affe, Esq., for US Sprint, an interested party.

Linda A. Donaghy, Esq., United States Department of Justice, for the agency.

Vincent L. Crivella, Esq., and Stuart Young, Esq., General Services Administration, for the agency.

David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

MCI Telecommunications Corporation protests that the Department of Justice (DOJ), Bureau of Prisons (BOP), improperly contemplates procuring long-distance telephone service for federal prison inmates from the US Sprint Communications Company on a sole-source basis. MCI contends that BOP's contemplated issuance of an order under Sprint's "FTS2000" contract (GS00K-89-AHD0009), with the General Services Administration (GSA) for telecommunication services will constitute both the improper use of the FTS2000 contract for personal calls and an improper sole-source award.

We deny the protest.

The Attorney General is charged with providing the "proper government, discipline, treatment, care, rehabilitation, and reformation" of inmates at federal correctional institutions. 18 U.S.C. § 4001 (1988). Inmates are entitled to place telephone calls "subject to limitations and restrictions which the Warden determines are necessary to insure the security, good order, and discipline of the institution and to protect the public." 28 C.F.R. § 540.100 (1989). According to BOP, phone privileges both allow inmates to maintain ties to their families and communities, thereby facilitating rehabilitation and reassimilation into the community after release, and, because access to telephones is desired by most inmates, it provides a means for behavior control. Telephone calls by inmates at most institutions are made by means of operator-assisted collect calls.

Recently, BOP has evaluated a new inmate calling procedure at the Federal Correctional Institution in Butner, North Carolina. Under the new procedure, inmates earn funds which are credited to their accounts and used to pay for telephone calls; the ability to make a telephone call is governed by a computer, which determines whether the inmate has current phone privileges and is authorized to call the number in question, verifies that sufficient funds are available in the inmate's account to pay for the call, limits the length of the call, and maintains a record of all calls. Based on the results of the Butner program, BOP has decided to adopt the new telephone system throughout the correctional system. BOP reports that the new system offers several potential benefits, including promoting correctional objectives by making inmates responsible for the cost of their calls, elimination of telephone company collection problems, thereby assuring access to telephone services for inmates able to pay for telephone calls, and enhancement of security by permitting telephone calls only to approved numbers and maintaining a record of the numbers being called.

For the Butner pilot program, BOP conducted a competitive procurement and selected MCI as the contractor to provide the telephone service component, but not the equipment. Subsequently, in December 1988, GSA awarded comprehensive, fixed-price, indefinite quantity contracts for intercity telecommunications

services—including switched voice service—to AT&T Communications, Inc. and Sprint. The resulting FTS2000 contracts provide that the FTS2000 program will be mandatory for all federal activities subject to the Brooks Act, 40 U.S.C. § 759 (1988), which includes the DOJ. 40 U.S.C. §§ 472, 759. Pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. §§ 486(c) and 751(f) (1988), GSA promulgated Federal Information Management Regulation Interim Rule 1, 41 C.F.R. § 201-41.005. This rule requires that federal activities use the FTS2000 network to satisfy telecommunications requirements which are within the scope of FTS2000 network services, unless an exception is obtained from GSA on the basis of an agency's unique or special purpose network requirements, or an exception is otherwise specifically available by law or regulation. This general requirement for use of FTS2000 was subsequently set forth in section 621 of Pub. L. No. 101-136, 103 Stat. 783, 821, which provides that:

None of the funds appropriated by this or any other Act may be expended by any Federal agency to procure any product or service that is subject to the provisions of [the Brooks Act] and that will be available under the procurement by the Administrator of General Services known as "FTS2000" unless—

(1) such product or service is procured by the Administrator of General Services as part of the procurement known as "FTS2000"; or

(2) that agency establishes to the satisfaction of the Administrator of General Services that—

(A) the agency's requirements for such procurement are unique and cannot be satisfied by property and services procured by the Administrator of General Services as part of the procurement known as "FTS2000"; and

(B) the agency procurement, pursuant to such delegation, would be cost-effective and would not adversely affect the cost-effectiveness of the FTS2000 procurement.

The responsibility for providing services to DOJ under the FTS2000 contracts has been assigned to Sprint. When requested by BOP to consider providing inmate telephone service throughout the correctional system under its FTS2000 contract, Sprint requested GSA's authorization to proceed. After GSA initially refused to authorize use of the FTS2000 system by federal inmates, DOJ requested reconsideration of GSA's decision; it advised GSA of the details of the system, the objectives to be accomplished, and the agency's determination that use of FTS2000 was cost-effective, efficient and in the best interest of BOP. Upon learning of GSA's subsequent reversal of its initial position and authorization for the placement of orders under Sprint's FTS2000 contract, MCI filed this protest with our Office.

As an initial matter, BOP and GSA, which have separately responded to the protest, maintain that MCI is not an interested party to challenge the contemplated issuance of delivery orders under Sprint's FTS2000 contract. The agencies state that under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (1988), and our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1990), a protest may be brought only by an interested party, defined under the statute as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." They point out that MCI did not submit a proposal in the

FTS2000 competition, but instead participated only as a potential subcontractor. Nor do they believe that MCI falls within the definition of an interested party on the basis of any interest as a prospective offeror under a future competition for long-distance telephone service for federal inmates. In this regard, they cite the recent decision in *MCI Telecommunications Corp. v. United States*, 878 F.2d 362 (Fed. Cir. 1989), holding that MCI's stated intention to participate in any resolicitation did not give it standing to challenge the award of the FTS2000 contract to AT&T since MCI had not submitted a proposal in response to the FTS2000 solicitation. According to the court, "the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends." *Id.* at 365.

The agencies' focus on the fact that MCI did not participate in the original competition is misplaced. If, as alleged by MCI, providing long-distance telephone service for federal inmates is outside the scope of the FTS2000 contracts, then MCI never had the opportunity to compete for award of a contract to provide this service. For this reason, the facts here are distinguishable from those in *MCI Telecommunications Corp. v. United States*, *supra*, where the plaintiff sought to challenge the award of a contract for which it had the opportunity to compete but chose not to do so. MCI, allegedly not having had the opportunity to compete for providing long-distance telephone service for inmates, now seeks that opportunity by means of this protest. As such, it is a prospective offeror and therefore an interested party under CICA to file this protest. *Neal R. Gross & Co., Inc.*, 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212, *aff'd*, *The Dept. of Labor—Recon.*, B-237434.2, May 22, 1990, 90-1 CPD ¶ 491 (contract modification is beyond the scope of the original contract and the subject of the modification thus should be competitively procured absent a valid sole-source justification).

Turning to the merits, we find that the inmate telephone services are within the scope of Sprint's FTS2000 contract, and that placing orders for such services thus would not require a modification or change in the contract. First, the FTS2000 solicitation advised offerors that the objectives of the FTS2000 program were to "obtain a comprehensive set of telecommunications services" through contractors "responsible for providing all services and network management" while "ensuring continued improvements in FTS2000 services and prices."¹ The solicitation specifically provided for additional users, stating that the contemplated "contract is for the use of all federal agencies . . . and any other user authorized by GSA."

Second, there was no provision in the FTS2000 solicitation which describes coverage of the contract in terms of the content of telephone calls. Indeed, FTS2000 offerors were clearly on notice that GSA considered some otherwise personal calls as being necessary in the interest of the government. Prior to the closing

¹ The FTS2000 solicitation incorporated into the contract specifically required supporting switched voice service from on-net locations—that is, those subscribing to FTS2000 services—to off-net locations—that is, those that do not subscribe to FTS2000 services—and further provided that delivery points may be located off government premises. This definition of the requirement clearly encompasses calls from federal correctional institutions to private locations.

date for receipt of initial proposals, GSA published in the *Federal Register* final regulations authorizing personal calls by government employees traveling on government business and calls by employees to family, residence, local government agencies, or physicians. 52 Fed. Reg. 42,292, 42,294 (1987). Here, BOP, with the concurrence of GSA, has determined that making long-distance telephone service available to inmates furthers the conduct of official government business by aiding the rehabilitative process through encouraging inmates to assume responsibility and perform useful services so as to earn money to pay for calls, encouraging the maintenance of family and community ties, and otherwise assisting in the assimilation of released inmates into the community. As noted above, by regulation in effect when the FTS2000 solicitation was issued, inmates generally are entitled to place telephone calls. 28 C.F.R. § 540.100.

We therefore conclude that the solicitation as incorporated into the subsequent FTS2000 contracts authorized use of the FTS2000 system by additional users and covered telephone services related to official government business, including telephone calls by inmates. In these circumstances, we find no basis to question the agencies' determination that the requirement for long-distance telephone service for federal inmates committed to the care and custody of the Attorney General falls within the comprehensive scope of the FTS2000 contract. Since the requirement for long-distance telephone service for federal inmates falls within the scope of the FTS2000 contracts, the DOJ, as a federal agency subject to the Brooks Act, is required by FIRMR Interim Rule 1, 41 C.F.R. § 201-41.005(c), to use the FTS2000 network to satisfy the requirement unless an exception is granted by GSA or is otherwise specifically provided. Here, GSA has determined that DOJ must use FTS2000 and no other specific exception is applicable.

MCI argues that even if the long distance service is within the scope of the FTS2000 contracts, BOP nevertheless was obligated to consider whether a competitive procurement should be conducted to obtain better prices. MCI contends that the phone calls ultimately will be paid for by the inmates rather than by appropriated funds, and that therefore BOP was not obligated by any procurement statute or regulation to place orders under Sprint's FTS2000 contract. MCI points out that section 621 of Pub. L. No. 101-136, quoted above, which was enacted after FIRMR Interim Rule 1, prohibits the use of appropriated funds for services that are available under FTS2000 contracts unless GSA provides a waiver.

MCI's argument that the restraint on the use of appropriated funds in section 621 of Pub. L. No. 101-136 means non-appropriated funds cannot be used for FTS2000 contracts is without merit. First, long-distance telephone service for federal inmates comes within the scope of the FTS2000 contracts, which provide for the "mandatory" use of FTS2000 "as implemented by" the FIRMR; as such, the requirement for telephone services has already been competed and we are aware of no basis for requiring further competition. Nothing in FIRMR Interim Rule 1, or the FIRMR generally, limits coverage to procurements funded by appropriated funds. On the contrary, FIRMR Interim Rule 1 defines its coverage

on the basis of whether the procurement is being conducted by a federal agency subject to the Brooks Act, and the coverage of the FIRMR extends to procurements by executive agencies. 41 C.F.R. § 201-1.103(c). In this regard, the United States Court of Appeals for the Federal Circuit held in 1989 that Congress did not consider the source of the funds relevant in determining the applicability of the Brooks Act. *United States v. International Business Mach. Corp.*, 892 F.2d 1006 (Fed. Cir. 1989) (procurement funded by Government Printing Office Revolving Fund).

Likewise, nothing in the history of section 621 demonstrates any intention to limit the coverage of the regulation and thus of FTS2000. Section 621 is a reenactment of an earlier provision, section 627 of Pub. L. No. 100-440, 102 Stat. 1721, 1757; the legislative history of this latter provision indicates that it was intended to limit the possible expenditure by the Department of Defense (DOD) of “scarce tax dollars” for unnecessarily duplicative or redundant systems, and designed to ensure the inclusion of additional users—such as DOD—in the FTS2000 procurement so as to increase economies of scale. S. Rep. No. 387, 100th Cong., 2d Sess. 114 (1988).

We conclude that providing long-distance telephone service for federal inmates is within the scope of the FTS2000 contracts and thus does not constitute a new requirement that must be competed.

The protest is denied.

B-238463, October 15, 1990

Military Personnel

Pay

■ Survivor benefits

■ ■ Annuities

■ ■ ■ Eligibility

■ ■ ■ ■ Illegitimate children

Claims for Survivor Benefit Plan annuities submitted by the mothers of illegitimate children of two deceased retired service members are denied because neither child lived with her father in a regular parent-child relationship, as required by 10 U.S.C. § 1447(5).

Matter of: Claims by illegitimate children of deceased Air Force members

We have been asked to render an advance decision on the propriety of paying Survivor Benefit Plan (SBP) annuities to two illegitimate children of deceased Air Force retired members.¹ The question arises because of various court cases

¹ The Department of Defense Military Pay and Allowance Committee has assigned the number DO-AF-1497 to the request.

interpreting the statutory language requiring such children to have lived with the member in a regular parent-child relationship. Additionally, we are asked if the fact that the member's assignments prevented him from living with the child has any bearing on entitlement to an annuity. For the reasons presented below, annuities may not be paid to these children.

Background

The record submitted to us indicates that the first child, who was born September 25, 1983, is the illegitimate daughter of a deceased retired member of the Air Force. The member entered on active duty in 1979. He was retired with a disability on April 5, 1988, and died soon thereafter. He designated the child to receive as his daughter the arrears of his pay, but on his SBP election form he indicated that he had no spouse or children and declined SBP coverage. However, the SBP form was executed after he became entitled to retired pay and therefore any eligible beneficiaries would be covered as soon as he retired. The child is receiving both Social Security benefits and benefits from the Department of Veterans Affairs. The mother of the child maintains that the member would have elected coverage for the child if he had believed that he could and claims an annuity on her behalf. The mother of the child has submitted statements by the deceased member's relatives indicating that the member had acknowledged that he was the father of the child. However, the mother indicates in a letter that the child had not lived with the member and only visited him briefly while he was in the hospital. She also points out that following the birth of the child his various military assignments prevented him from seeing the child.

The second case involves a child who was born January 24, 1978, and is the illegitimate daughter of another deceased retired Air Force member. When the member retired from the Air Force in 1977, he elected "child only" coverage for another daughter who was the only one of his children then eligible for coverage. He named his illegitimate child, who was born after he retired, as his daughter in his will. After he died in 1986, the child's mother obtained a court order adjudicating him to be the father. Additionally, many statements have been submitted by individuals indicating that the member acknowledged paternity of the child, that a parental relationship existed between the member and child, and that the member and child spent occasional weekends at his home and spent vacations together. It appears, however, that the child regularly resided with her mother. The mother claims an SBP annuity on the child's behalf.

Analysis

Congress enacted the SBP in 1972 as an income maintenance program for the surviving dependents of retired service members. *See* Pub. L. No. 92-425, 86 Stat. 706, 10 U.S.C. §§ 1447-1455. Section 1450(a) of title 10 provides for the payment of an SBP annuity to a "dependent child" in appropriate circumstances. Section 1447(5) defines a "dependent child" as one who is:

(A) unmarried;

(B)(i) under 18 years of age, . . . and

(C) the child of a person to whom the plan applies, including (i) an adopted child, and (ii) a stepchild, foster child or recognized natural child who lived with that person in a regular parent-child relationship.

Our decision involves subsection (C)(ii), *supra*. For the purpose of the statute, both children in this case are “natural children,” and it appears from the record that both were “recognized” by their fathers. The requirement that each child must have lived with her father in a regular parent-child relationship is the point at issue here.

In this regard the submission points out that at the time the SBP was enacted, the definition of a “child” in the civilian employees’ survivor annuity system was similar to the SBP’s definition—i.e., a recognized natural child had to have lived with the employee or member in a regular parent-child relationship. *See* 5 U.S.C. § 8341(a)(4) (1976). In January 1980, after several court rulings concluding that the “lived with” requirement was unconstitutional, Congress removed that requirement from the civilian survivor annuity program but has not removed the requirement from the SBP. *See* Pub. L. No. 96-179, 93 Stat. 1299 (1980).

It has long been the position of this Office that whether a law is constitutional is a question for the courts. *Intra-Con Security Systems Inc.*, B-186437, B-185495, March 7, 1977. While several lower courts found the “lived with” requirement in title 5 unconstitutional, the Supreme Court expressly refused to address that issue, *United States v. Clark*, 445 U.S. 23 (1980), and we are aware of no decision holding the title 10 provision unconstitutional. Under these circumstances we must view 10 U.S.C. § 1447 as the applicable law in this case.

The submission also questions the meaning of the phrase “lived with in a regular parent-child relationship” as used in 10 U.S.C. § 1447(5), since quite often a member’s assignments prevent him from living with his family. We view this phrase as contemplating that the child live in the household of the member as part of the family unit. The parent-child relationship requirement is met if the child lives in that household even when the member is away from the household as a result of his or her military assignment. However, in the two situations before us, we find no indication that the children ever lived with their fathers or in their households.

The record reveals that the first child visited her father for a few days while he was in the hospital, but there is no indication that they had ever lived together in a parent-child relationship. The second child apparently had frequent contact with her father and spent brief periods of time in his residence or with him on vacation. However, the statements in the record indicate they lived in separate households.

Accordingly, we must deny the claims of the children for SBP annuities.

B-240156, October 16, 1990

Procurement

Contractor Qualification

- Responsibility
 - ■ Contracting officer findings
 - ■ ■ Negative determination
 - ■ ■ ■ Criteria
-

Procurement

Contractor Qualification

- Responsibility
- ■ Financial capacity
- ■ ■ Contractors

Where processing bank declined to accept high bidder's credit card for the amount of his bid deposit, protest that contracting officer improperly rejected bid as nonresponsive is sustained since (1) deficiency in credit balance pertains solely to bidder's responsibility and can therefore be cured any time prior to award; (2) despite credit deficiency, government's interests were never at risk since as part of its bid, the bidder had submitted a pre-approved bid bond which insured the government against all default by the bidder, even where the bidder's instrument of payment was in a non-guaranteed form such as a credit card; and (3) prior to award, the bidder promptly cured credit deficiency with cash.

Procurement

Sealed Bidding

- Bids
- ■ Modification
- ■ ■ Interpretation
- ■ ■ ■ Intent

Since property sales contemplate award being made on an item-by-item basis, where bidder sets forth in his bid deposit statement that his total contract price is "\$1,602" and that the amount of his bid deposit is "20% of Bid," subsequent facsimile modifications which contain the solicitation number, the word "modification," the date, the signature of the bidder, and a clear itemized list of new bids and corresponding bid prices reasonably can be construed to mean that the initial contract price of \$1,602 has been modified; under these circumstances, the \$1,602 figure does not limit the amount of bidder's deposit and contractor is entitled to award on all items for which he was high bidder.

Matter of: N.G. Simonowich

N.G. Simonowich for the protester.

John Avril for G.A. Avril Company, an interested party.

Bruce W. Baird, Esq., Defense Logistics Agency, for the agency.

Behn Miller and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

N.G. Simonowich protests the award of items 26, 99, 103, 144, 146, 151, 152, 154, 157, 158, 180, 181, 182, and 183 under invitation for bids (IFB) No. 31-0133, issued by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Region (DRMR), for the sale of various kinds of scrap metal. Specifically, Simonowich protests that its bid was improperly rejected as nonresponsive.

We sustain the protest.

Background

The IFB set bid opening for June 12, 1990, and required each bidder to provide a bid deposit in an amount equal to 20 percent of the total bid price; under the terms of the IFB, the bid deposit could be made by cash, cashier's check, certified check, traveler's check, bank draft, money order, or by charge to a VISA or MasterCard credit card account. Bidders with letters of credit or bid bonds could make their bid deposits by uncertified company checks. At section B01, the IFB also provided:

If a credit card is used as a bid deposit and acceptance is declined by the processing bank the bid will be declared nonresponsive.

The IFB also provided that bidders could modify their initial bids by telegraph or facsimile; in the event of such a modification, the IFB stated that:

[A]ny modification which increases the amount of a bid already submitted . . . must provide for an increased bid deposit.¹

The record shows that Simonowich submitted an initial bid followed by two bid modifications on successive dates. On June 8, using the agency's standard bid form 114, Simonowich submitted a bid for items 147 and 151. On the cover page of the bid form, each bidder was required to complete a bid deposit statement; Simonowich's statement read as follows:

The total amount of my bid is \$1,602.00 and attached is the bid deposit, when required by the Invitation, in the form of *Bid Bond 90-188* and *VISA*, in the amount of 20% of Bid.

The dollar figure Simonowich inserted—\$1,602—represented the total price of Simonowich's bids for items 147 and 151; Bid Bond 90-188 referenced Simonowich's \$50,000 annual deposit bond for the period November 3, 1989, through September 30, 1990.²

With his bid, Simonowich also included a credit card information sheet which the agency required from any bidder who intended to pay either the bid deposit or final contract price by means of a credit card. The credit card information sheet advised bidders that if they were successful, the agency would automatically debit the bidder's credit card for "20% of the contract price"; Si-

¹ This requirement appears in DRMR's instructions on surplus sales, which the IFB incorporated by reference.

² The bond guarantees any individual bid not exceeding \$250,000 submitted by Simonowich for a sale of surplus property for the fiscal year ending September 30, 1990, up to the penal amount of the bond (\$50,000).

monowich's completed sheet contained all the credit card information required by the agency to access Simonowich's VISA account.

The IFB also advised bidders that the agency would accept facsimile bids or bid modifications. On June 11, by facsimile, Simonowich submitted a hand-written modification in which he restated his bid price for items 147 and 151 and offered bids on 25 other IFB items. On June 12, again by facsimile, Simonowich submitted a second hand-written modification in which he increased his prior bids on 6 items and offered bids on 50 more items. As a result of the modifications, the number of items for which Simonowich offered bids increased to 77; however, despite this bid increase, Simonowich did not re-execute or modify his initial June 8 bid deposit statement to reflect the increase in his total bid price.

At the June 12 bid opening, Simonowich was determined to be the high bidder on 14 of the 77 items on which he had bid. Apparently because items 180, 181, and 182 required a preaward survey, the agency delayed processing Simonowich's bid until the survey was completed.

On the morning of June 20, Simonowich's secretary contacted the contracting officer and inquired about the bidding results. The contracting officer informed the secretary that while Simonowich was high bidder on several items, final award could not be determined or processed until the results of the pre-award survey were received.

Later that day, at 1:15 p.m., Simonowich's secretary again called the contracting officer to check the status of the award. The contracting officer informed the secretary that based on the survey's results, Simonowich would be awarded all the items for which he was high bidder. The contracting officer further advised the secretary that she would contact Simonowich with the final contract price as soon as the award paperwork was ready for signature.

At 2 p.m., the contracting officer telephoned Simonowich's office and informed Simonowich's secretary that the total contract price for Simonowich's bid was \$119,927.17, and accordingly, the 20 percent bid deposit, which would be charged to Simonowich's VISA account, amounted to \$23,985.43. The contracting officer also advised Simonowich's secretary that no award could be made until the bid deposit was charged to the VISA account.

Simonowich's secretary then asked the contracting officer to charge the bid deposit to Simonowich's MasterCard account instead of the VISA account since as of that date, the charge limit on his VISA account was full. The contracting officer refused. Simonowich's secretary then requested time to get the VISA account in order; the contracting officer also denied this request. A few minutes later the agency's cashier advised the contracting officer that the processing bank had just declined Simonowich's credit card for the amount of the bid deposit. When Simonowich's secretary called the contracting officer a few minutes later, the contracting officer advised her that because the bank had declined Simonowich's VISA credit card for the amount of the \$23,985.43 bid deposit, Simonowich's bid was nonresponsive.

Shortly thereafter, Simonowich telephoned the contracting officer and told her that the VISA charge had been declined due to a banking error; Simonowich advised the contracting officer that the processing bank's president would be immediately contacting the officer about the VISA account. Simonowich also asked the contracting officer to allow his proposed award on the 14 items to stand since he was in the process of correcting the VISA credit deficiency.

At 2:55 p.m., the processing bank's president telephoned the contracting officer and told her that \$24,000 had been wired to Simonowich's VISA account. At 3 p.m., the contracting officer contacted the bank that had sent the \$24,000 to the processing bank and learned that the money transfer had taken place earlier that afternoon. Despite the cash transfer, the contracting officer determined that the Simonowich bid remained nonresponsive.

Later that afternoon, Simonowich protested the rejection of its bid for nonresponsiveness to the contracting officer. The contracting officer refused to reverse her determination of nonresponsiveness. On June 22, Simonowich filed his protest with our Office.

We find that DLA improperly rejected Simonowich's bid as nonresponsive.

Analysis

Responsiveness of Simonowich's Bid

Bid deposits and bid bonds are forms of bid guarantees designed to protect the government's interests in the event of a bidder's default. *Marine Power and Equip. Co., Inc.*, 62 Comp. Gen. 75 (1982), 82-2 CPD ¶ 514. If a bidder fails to honor his bid in any respect, the bid bond secures a surety's liability for all excess procurement costs. *Surface Preparation & Coating Enters., Inc.*, B-235170, July 20, 1989, 89-2 CPD ¶ 69. A bid deposit similarly obligates a bidder not to withdraw before award and to pay the full purchase price; while a bid deposit may be applied towards the purchase price of goods being sold by the government, in the event the bidder defaults on his contractual obligations, the government may retain the deposit as liquidated damages. *Marine Power and Equip. Co., Inc.*, 62 Comp. Gen. 75, *supra*. Bid deposits offer some advantages over bid bonds—the government has immediate access to the funds without any defenses sureties might raise. On the other hand, bid deposits tie up all bidders' funds for a period of time.

In determining whether a bid is responsive to a bid deposit requirement we look to see whether the bid deposit documents submitted at bid opening are in the form required by the solicitation. *See Forbes Mfg., Inc.*, B-237806, Mar. 12, 1990, 90-1 CPD ¶ 267 (where bidder's personal check rendered his bid nonresponsive since the solicitation provided that the only acceptable form of bid deposit was a guaranteed instrument of payment). Submission of a bid deposit in the exact manner and form called for by the solicitation demonstrates that the bidder has obligated itself to forfeit the bid deposit in the event that it withdraws before

award or fails to pay the full purchase price. See *Marine Power and Equip. Co.*, 62 Comp. Gen. 75, *supra* (replacement of one valid negotiable instrument with another did not render a bid nonresponsive where the bidder had executed all documents necessary to create a binding procurement contract at the time of bid opening).

In this case the contracting officer rejected Simonowich's bid as nonresponsive because of the insufficient credit line in the VISA account he pledged. He relies in support on the solicitation statement that if a credit card is used as a bid deposit, an insufficient credit line will render a bid nonresponsive. As discussed below, this language is not controlling; we find that Simonowich's bid was responsive.

On the cover page of his bid, Simonowich clearly stated that his VISA account was to be debited to cover the 20 percent bid deposit charge. The accompanying credit card information sheet submitted by Simonowich was complete and contained no irregularities or facial defects; thus, Simonowich's VISA pledge represented a firm commitment by Simonowich to be liable for the bid deposit. Since his bidding documents clearly bound him to furnish the bid deposit by means of a credit card charge, an instrument explicitly approved for use as a bid deposit by the solicitation, Simonowich's bid was responsive. See *Marine Power and Equip. Co.*, 62 Comp. Gen. 75, *supra*; *Intermountain Paper Stock, Inc.*, B-211269, Apr. 22, 1983, 83-1 CPD ¶ 450. As explained below, the sufficiency of the protester's credit line—the basis on which DLA rejected the bid as nonresponsive—in fact concerns the protester's responsibility.

Whereas bid responsiveness concerns whether the bid itself unequivocally offers to perform in conformity with all material terms and conditions of a solicitation, "responsibility" refers to a bidder's ability to perform all the contract requirements, and is determined not at bid opening, but at any time prior to award based on information received by the agency up to that time. *Ibex, Ltd.*, B-230218, Mar. 11, 1988, 88-1 CPD ¶ 257. Although the agency argues that the IFB expressly warned all bidders that a credit card deficiency would render a bid nonresponsive, a requirement which relates to responsibility cannot be converted into a matter of responsiveness merely by the terms of the solicitation. See *Sage Assocs. Gen. Contractors, Inc.*, B-235497, Aug. 15, 1989, 89-2 CPD ¶ 141; *Norfolk Dredging Co.*, B-229572.2, Jan. 22, 1988, 88-1 CPD ¶ 62.

A bid deposit is analogous to a bid bond; in the case of bid bonds, the question of the financial acceptability of a surety, as a matter of responsibility, may be established any time before actual contract award. See *National Hazard Control Corp.*, B-237194, Feb. 9, 1990, 90-1 CPD ¶ 168; *Transcontinental Enters., Inc.*, 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. The adequacy of Simonowich's VISA credit line is no different, since it essentially pertains to the adequacy of the assets supporting the bid deposit.

On matters of responsibility, the contracting officer should ordinarily solicit and consider information on the issue any time before award. *National Hazard Control Corp.*, B-237194, *supra*. Moreover, in situations where a bidder has immedi-

ately corrected a principal factor on which a nonresponsibility determination hinges prior to award, we have held that the contracting officer should accept the new evidence of responsibility. See *Transcontinental Enters., Inc.*, B-225802, *supra*; *Tomko, Inc.*, 63 Comp. Gen. 218 (1984), 84-1 CPD ¶ 202. In this case, the contracting officer knew and verified that the credit deficiency had been cured by a transfer of funds by the protester; moreover, there is no evidence in the record suggesting that the deficiency was the result of any fraud or other improper action on the protester's part. Accordingly, the VISA deficiency, since it was remedied before award, did not provide a basis for rejecting Simonowich as nonresponsible. *Transcontinental Enters., Inc.*, B-225802, *supra*.

Application of the Bid Bond

The VISA credit charge deficiency did not adversely affect the government's ability to protect its interests since, in addition to his VISA credit card, Simonowich also presented his annual agency deposit bid bond for the amount of the bid deposit.

In determining whether a bid guarantee is responsive, a bidder's intentions must be determined at bid opening from all the bid documents, which include any bid bond or other documents in the agency's possession. *The Ramirez Co. and Zenon Constr. Corp.*, B-233204, Jan. 27, 1989, 89-1 CPD ¶ 91. In this case, the bid bond constituted an integral part of Simonowich's bid, since on the face of his bid document Simonowich set forth that his bid deposit took the "form(s) of Bid Bond 90-188 and VISA."

Under the terms of Bid Bond 90-188, regardless of the contractor's instrument of payment: "[F]or failure to pay the purchase price of any bid . . . the principal shall pay the Government as liquidated damages an amount equal to 20% of the purchase price." Thus, if Simonowich were to default on his bid, the government had access to 20 percent of the amount of Simonowich's total bid price under the bond.

When the agency initially notified Simonowich that his annual bid deposit bond had been approved, by letter dated November 6, 1989, the agency informed Simonowich that: "[t]his bond will allow you to submit uncertified personal or company checks as a bid deposit"

The IFB also stated: "Bidders whose bid or payment is accompanied by a letter of credit or who have on file an approved bid bond . . . may make their bid deposit and/or payments by uncertified personal company checks."

Accordingly, DLA argues that the bid bond applies only where a company or personal check, not a credit card, is presented as an instrument of payment. We disagree. Nothing on the face of the bond or in the agency's regulations prohibits a contractor's bond or letter of credit from guaranteeing any instrument of payment presented by the contractor. Even under the agency's view restricting the application of a bid bond to instances where a non-guaranteed instrument of payment is involved, we see no reason why the bid bond should not apply in

this case. By their non-guaranteed nature, a check and credit card are equivalent. Like a personal or company check, use of a credit card is contingent upon sufficient credit or funds in the contractor's account; a VISA credit card is just as susceptible to a stop-payment order as a check. Since both are non-guaranteed forms of payment, we see no distinction between a personal or company check and an individual's credit card for purposes of relying upon a bid bond in the event of a contractor's default.

Award to Simonowich

The record shows that although Simonowich submitted two modifications to his bid, he never re-executed his initial bid deposit statement. Accordingly, although Simonowich's bid deposit statement clearly states that the deposit is in the amount of "20% of Bid," the statement also lists a contract price of \$1,602 based on Simonowich's initial bid. We do not find this defect prevents award to Simonowich of all those items on which he submitted the high bid.

According to the agency, because of the rapid fluctuations in market prices for scrap metal, it is common practice in the scrap metal industry to submit an initial sealed bid which is subsequently modified by facsimile. Despite the provision in the IFB requiring a bidder to provide for an increased bid deposit, as a general policy DLA does not require a bidder to re-execute his bid deposit statement when he modifies his bid, as long as the initial statement indicates that the deposit is in the amount of 20 percent of the total contract price and sets forth an acceptable instrument of payment. According to the agency, when a bidder presents a modification enumerating the item numbers and corresponding bid prices, the agency assumes that the contract price portion of the initial bid deposit statement is modified accordingly.

Simonowich clearly indicated in the bid deposit statement that his bid deposit amount was 20 percent of his bid. In the facsimile modifications, Simonowich listed the new items for which he was bidding with his offered bid prices; each facsimile was clearly labeled "Bid Modification," listed the solicitation number and the date, and was signed by Simonowich. Based on these documents, and given DLA's description of its treatment of bid modifications in this area, it is reasonable to assume that Simonowich intended to modify the contract price listed in his initial bid deposit statement to account for its increased bid.

In addition, the IFB clearly provided that bidders could modify their initial bids by telegraph or facsimile modifications. In the case of telegraphic modifications—which are analogous to facsimile modifications—FAR § 28.101-4(c)(6) provides that noncompliance with a bid guarantee shall be waived when: "[A] telegraphic offer modification is received without corresponding modification of the bid guarantee, if the modification expressly refers to the previous offer and the offeror corrects any deficiency in bid guarantee." Thus, Simonowich's failure to amend the amount of his bid guarantee when he modified his bid is waivable since the modification expressly referred to his previous bid and he later effec-

tively corrected the amount of the bid guarantee, as contemplated by the FAR provision.

Accordingly, we find that Simonowich's failure to revise the contract price in his initial bid deposit statement is not a fatal flaw in his bid.

Recommendations

Based on our finding that DLA improperly rejected Simonowich's bid as nonresponsive due to an insufficiency in the credit line Simonowich pledged as his bid deposit, which was cured by the protester before award, we recommend that Simonowich be awarded the 14 scrap metal items for which he was high bidder.

The General Services Administration (GSA)—whose surplus sales totaled \$99.4 million in fiscal year 1989—requires its contracting activities to process all credit card transactions immediately upon bid opening. If the GSA contracting activity does not have the electronic authorization equipment at the site of the bid opening or sale, the agency prohibits credit cards from being used as an instrument of payment.³ We recommend that DLA consider adopting a similar policy, or in the alternative that the agency consider requiring bidders who use credit cards to back them up with a bid bond, as Simonowich did here. Since credit cards are not guaranteed instruments and are subject to such events as insufficient funds and stop-payment orders, they may not adequately protect the government's interests. *See Marine Power and Equip. Co.*, 62 Comp. Gen. 75, *supra*; *Intermountain Paper Stock Inc.*, B-211269, *supra*.

The protest is sustained.

B-240011, October 17, 1990

Procurement

Competitive Negotiation

■ Requests for proposals

■ ■ Terms

■ ■ ■ Service contracts

■ ■ ■ ■ Applicability

Procurement

Socio-Economic Policies

■ Service contracts

■ ■ Regulations

■ ■ ■ Applicability

Protest is sustained where the procuring agency unreasonably disregarded the Department of Labor's determination that the Service Contract Act was applicable to the agency's procurement and in proceeding to receive proposals in the face of Labor's determination.

³ 6.8 percent of GSA's sales are credit card sales.

Matter of: Information Handling Services

John F. McIver, Jr., for the protester.

Richard T. Holland for Dataware Technologies, Inc., an interested party.

Roy E. Potter, Esq., United States Government Printing Office, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Information Handling Services protests the Government Printing Office's (GPO) determination that the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.* (1988), was not applicable to GPO's request for proposals (RFP) for Program 900-S, "Federal Logistics Data on Compact Disc—Read Only Memory," to support the Defense Logistics Agency's (DLA) modernization of the Federal Catalog System (FCS).

We sustain the protest.

The FCS is a single catalog system for supply data, operated by the Department of Defense (DOD), pursuant to the Defense Cataloging and Standardization Act, 10 U.S.C. § 2451 *et seq.* (1988). DLA has been delegated the responsibility for collecting and disseminating FCS logistics data. DOD and civilian agencies use FCS to obtain logistics information (such as stock numbers and reference numbers, item names and control numbers, and interchangeability/substitutability data) to identify, describe, cross-reference, maintain, and requisition supplies. DLA currently distributes this information on microfiche. As part of its modernization efforts, DLA seeks to substitute compact disc technology for microfiche. The authority to conduct this procurement was delegated to GPO by DLA.

The RFP, issued November 3, 1989, contemplated the award of a fixed-price contract to convert the FCS from microfiche to compact disc. The RFP as originally issued provided that the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.*, was applicable. Amendment No. 3 deleted the statement that the contract would be subject to the Service Contract Act and incorporated by reference the standard clause contained at Federal Acquisition Regulation (FAR) § 52.222-20, "Walsh-Healey Public Contracts Act," which provides that any contract for materials or supplies, exceeding \$10,000, is subject to the requirements of the Walsh-Healey Act. *See* 41 U.S.C. § 35 *et seq.* (1988).¹

On May 4, 1990, the protester, along with the National Standards Association and USA Information Services, Inc., requested that the Department of Labor de-

¹ The Service Contract Act, 41 U.S.C. §§ 351-358, requires contractors performing service contracts with the government to pay minimum wages and fringe benefits, as determined by the Secretary of Labor, while the Walsh-Healey Act, 41 U.S.C. §§ 35-45, provides for payment of minimum wages to employees performing federal contracts for the manufacture or furnishing of materials, supplies, articles, and equipment.

termine the applicability of the Service Contract Act to the RFP.² On May 10, Labor determined, from its review of the RFP statement of work, that the Service Contract Act was applicable to the solicitation and requested that GPO submit to Labor an SF-98, "Notice of Intention to Make a Service Contract."

GPO did not respond to Labor or to the protester or amend the RFP to incorporate the Service Contract Act, and Information Handling protested to our Office on June 12, before the closing date for receipt of proposals.³ On June 14, GPO received initial proposals, including a proposal from Information Handling, and, on July 18,⁴ requested that Labor reconsider its determination that the Service Contract Act was applicable. Labor is presently reconsidering the applicability of the Service Contract Act to this solicitation but has not issued its determination as of the time of this decision.

GPO requests that we dismiss Information Handling's protest because Labor, which has the authority to administer and enforce the Service Contract Act, is considering the applicability of the Service Contract Act to this procurement, and GPO states that it will abide by Labor's final decision in this regard.

Labor is vested with primary responsibility for interpreting and administering the Service Contract Act, *see* 41 U.S.C. § 353, and we will defer to Labor's judgment as to the applicability of the Service Contract Act, unless Labor's position is clearly contrary to law. *B.B. Saxon Co., Inc.*, 57 Comp. Gen. 501 (1978), 78-1 CPD ¶ 410. Information Handling does not request that we determine the applicability of the Service Contract Act to this procurement; rather, its protest concerns GPO's unreasonable disregard of Labor's determination that the Service Contract Act was applicable and its decision to proceed to receive proposals in the face of Labor's determination.

The regulations implementing the Service Contract Act and Walsh-Healey Act contemplate an initial determination by the procuring agency as to which statute applies to a particular procurement. If the agency believes that a proposed contract "may be subject to" the Service Contract Act, it is required to notify Labor of the agency's intent to make a service contract so that Labor can provide the appropriate wage determination. 29 C.F.R. § 4.4 (1990). If the agency reasonably determines that a contract is not subject to the Service Contract Act, then there is no duty on its part to notify Labor or include Service Contract Act provisions in the solicitation. *Tenavision, Inc.*, B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114. On the other hand, if there exists any question or doubt as to the possible application of the Service Contract Act to a particular procurement, the agency is required to obtain Labor's views. 29 C.F.R. § 4.4(a)(1); FAR § 22.1003-7 (FAC 84-56); *Hewes Eng'g Co., Inc.*, B-179501, Feb. 28, 1974, 74-1 CPD ¶ 112.

The record here shows that GPO knew on May 10, more than a month prior to the closing date for receipt of proposals, that Labor was of the view that the

² Labor has primary responsibility for interpreting and administering the Service Contract Act. *See* 41 U.S.C. § 353.

³ No award has been made.

⁴ This was the same date on which GPO submitted a request for dismissal and report on the protest to our Office.

Service Contract Act was applicable to this procurement. Despite notice of Labor's views, GPO proceeded to receive initial proposals on June 14 and continued with its procurement. On July 18, the date its report on the protest was due, GPO requested that Labor reconsider its determination.

We find that GPO's failure to adhere to Labor's views as to the applicability of the Service Contract Act to this procurement was unreasonable and in violation of applicable regulations. *See* 29 C.F.R. § 4.4(a)(1); FAR § 22.1003-7. While GPO disagrees with Labor's views as to the applicability of the Service Contract Act, GPO does not contend that Labor's determination was clearly contrary to law, and Labor's views must prevail.

If an agency is on notice of the possible application of the Service Contract Act to a procurement, the agency should suspend the date for receipt of proposals while the matter is pending before Labor for its determination. *See Hewes Eng'g Co., Inc.*, B-179501, *supra*. Here, GPO requested reconsideration of Labor's determination of the applicability of the Service Contract Act more than 3 months after Labor's determination and only after proposals were received and this protest was filed. It was unreasonable and in violation of applicable regulations for GPO to have continued the procurement, without submitting an SF-98, in the face of Labor's determination. *Id.*

We recommend that GPO either (1) suspend all further contracting action on this procurement until Labor issues its determination on GPO's request for reconsideration of the applicability of the Service Contract Act, or (2) submit an SF-98 to Labor in accordance with Labor's determination. GPO should include in the RFP any minimum wage rate determination Labor finds applicable to the contract and solicit revised proposals from all offerors. Under the circumstances, the protester is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990). Information Handling should submit its claim for its protest costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

B-240980.2, October 17, 1990

Procurement

Bid Protests

■ **GAO procedures**

■ ■ **Protest timeliness**

■ ■ ■ **Significant issue exemptions**

■ ■ ■ ■ **Applicability**

Untimely protest of a solicitation's evaluation scheme will not be considered under the significant issue exception to the General Accounting Office (GAO) timeliness requirements where the issue raised in the protest has been considered on the merits by GAO in prior decisions and resolution of the issue would not be of widespread interest to the procurement community but only to the protester in this procurement. GAO will no longer invoke the significant issue exception solely because

the record shows a violation of statute or regulation. 68 Comp. Gen. 473 (1989), 66 Comp. Gen. 367 (1987), and 66 Comp. Gen. 31 (1986) will no longer be followed.

Matter of: DynCorp

Ruth Yudenfriend Morrel, Esq., for the protester.

Jeffrey I. Kessler, Esq., and Susan Leigh Mahone, Esq., Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DynCorp protests the award of a contract to Southern Aero Corporation under request for proposals (RFP) No. DAAJ09-89-R-0585, issued by the U.S. Army Aviation Systems Command, Department of the Army, for the maintenance, overhaul, and storage of UH-1H aircraft. DynCorp contends that the RFP evaluation scheme is defective, and that it would have received an award under a proper scheme.

We dismiss the protest as untimely.

The RFP contemplated the award of a fixed-price requirements contract for the maintenance, overhaul, and storage of UH-1H aircraft for a base year and 4 option years. The RFP stated that award would be made to the responsible offeror submitting the lowest priced, technically acceptable proposal and provided that the evaluated price would be determined by adding together the offeror's prices for all the contract line items. Southern Aero's evaluated price was \$25,364,342 and DynCorp's was \$25,649,490. The Army awarded a contract to Southern Aero on August 27, 1990.¹

DynCorp protests that award to Southern Aero will not result in the lowest "actual" cost to the government because the RFP evaluation scheme is defective. Specifically, DynCorp contends that the RFP provided in one line item for the transportation of 250 aircraft by truck to a government C-5 airfield and also provided in another line item for the transportation of the same 250 aircraft to a government C-141 airfield.² DynCorp argues that the aircraft will only be delivered to one of the airfields, not both, and that if the proposals were realistically evaluated, its evaluated price would be lower than Southern Aero's.³

¹ COSTAR, a joint venture of JL Associates, Inc. and Tero Tek International, Inc., submitted the lowest evaluated price proposal but was determined to be nonresponsive, and the Small Business Administration denied COSTAR's request for a certificate of competency (COC). COSTAR has protested the nonresponsibility determination and denial of a COC to our Office (B-240980).

² The RFP also provided that where the aircraft could be flown away by the government there would be no transportation costs for those aircraft.

³ It appears from the material submitted by the protester that DynCorp's evaluated price might be lower than Southern Aero's if only one of the transportation line items, or neither of the items, was included in the total evaluated price.

The Army contends that DynCorp's protest of the RFP evaluation scheme, filed after the closing date for receipt of proposals, concerns an apparent solicitation impropriety, which was required to be filed before the closing date for receipt of proposals under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1990). The Army requests that we dismiss DynCorp's protest as untimely.

DynCorp states that the RFP evaluation scheme "is a clear error evident on the face of the solicitation" which can be easily remedied, and will result in significant costs to the government if not corrected. DynCorp argues that we should consider the protest under the significant issue exception to our timeliness rules. See 4 C.F.R. § 21.2(b).

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Lucas Place, Ltd.—Recon.*, B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180. We may, in a given case, invoke the significant issue exception to our timeliness rules when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the interest of the procurement system. *Golden North Van Lines, Inc.*, B-238874, July 17, 1990, 69 Comp. Gen. 610, 90-2 CPD ¶ 44. In order to prevent the timeliness requirements from becoming meaningless, we will strictly construe and seldom use the significant issue exception, limiting it to protests that raise issues of widespread interest to the procurement community, see, e.g., *Golden North Van Lines, Inc.*, B-238874, *supra*, and which have not been considered on the merits in a previous decision. *Keco Indus., Inc.*, B-238301, May 21, 1990, 90-1 CPD ¶ 490. The resolution of issues that only relate to the requirements and evaluation procedures of a single solicitation do not generally fall within the exception. See *NFI Management Co.*, B-238522; B-238522.2, June 12, 1990, 69 Comp. Gen. 515, 90-1 CPD ¶ 548.

In our view, the issue of whether the evaluation scheme is defective and would result in the lowest overall cost to the government is not of sufficient interest to the procurement community to invoke the exception. We have numerous decisions which discuss the government's obligation to evaluate proposals under an evaluation scheme which would permit the accurate assessment of the probable cost of award and which provides for the lowest ultimate cost to the government. See *Environmental Technologies Group, Inc.*, B-236813.2, Dec. 20, 1989, 89-2 CPD ¶ 573. Thus, while we recognize the importance of the matter to the protester, we do not regard DynCorp's protest, concerning the allegedly defective evaluation scheme in this single procurement, to be a significant issue under our Regulations.

DynCorp contends that several cases indicate that if the record establishes a clear violation of statute or regulation, we will invoke the significant issue exception. *Reliable Trash Service Co. of MD, Inc.*, 68 Comp. Gen. 473 (1989), 89-1 CPD ¶ 535; *Adrian Supply Co.—Recon.*, 66 Comp. Gen. 367 (1987), 87-1 CPD ¶ 357; and *R.P. Densen Contractors, Inc.*, 66 Comp. Gen. 31 (1986), 86-2 CPD ¶ 401. In those cases, at the time it became evident to us that the protester was untimely, the record clearly reflected a material error by the agency in the con-

duct of the procurement. In the interest of advancing the purpose of the rules governing the procurement system—to fairly and efficiently obtain the goods and services required by the federal government—we sustained the protests. We now believe that, in order to assure the perception that the timeliness rules are equitably enforced, the preferable approach is not to waive the timeliness rules, but to notify the agency of a possible violation by separate letter so that the agency may address the matter as appropriate. For that reason, we have notified the Army in this case that its evaluation scheme may have been defective, and decline to entertain DynCorp's untimely protest.

The protest is dismissed.

B-231370, October 18, 1990

Procurement

Payment/Discharge

■ Payment withholding

■ ■ Prompt payment discounts

■ ■ ■ Propriety

The Government Printing Office (GPO) was entitled to take prompt payment discounts on contract payments owed to Swanson Typesetting Service but paid to the Internal Revenue Service (IRS) pursuant to notice of levy even though actual transfer of funds to IRS did not occur until after contractual payment period for prompt payment discounts. GPO may not be deprived of its right to take prompt payment discounts where payment to contractor is withheld on account of an IRS levy notice.

Procurement

Payment/Discharge

■ Payment priority

■ ■ Payment procedures

■ ■ ■ Set-off

Although IRS served notice of levy on GPO pursuant to 26 U.S.C. § 6331, we view such notice as an IRS request for GPO to set off amounts GPO owed its contractor. *U.S. for Use of P.J. Keating Co. v. Warren Corp.*, 805 F.2d 449, 452 (1st Cir. 1986). Thus, GPO properly transferred to IRS amounts owed the contractor, Swanson Typesetting Service, on invoices received both before and after receipt of the notice of levy.

Matter of: Swanson Typesetting Services

In response to a Notice of Levy issued by the Internal Revenue Service (IRS), the United States Government Printing Office (GPO) withheld a number of payments owed to one of its contractors and subsequently transferred the withheld amounts to the IRS. Of the payments withheld and paid to IRS, some became due prior to the date that GPO received the IRS notice and some became due after that date. Before making payment to IRS, GPO took prompt payment dis-

counts on all of the withheld amounts. The contractor, Swanson Typesetting Service (Swanson), challenges the propriety of the GPO's implementation of the levy and disputes GPO's authority to take prompt payment discounts on the withheld payments. The General Counsel of GPO seeks our advice on these issues under 31 U.S.C. § 3529 (1982).

We conclude that GPO properly transferred to the IRS the payments owed to Swanson since we view the transfer as a setoff even if initiated pursuant to a formal notice of levy. We also conclude that GPO was entitled to take prompt payment discounts since payments would have been made within the discount period but for the IRS notice of levy.

Background

Swanson is one of a number of contractors from whom GPO procures printing services. Under its contract with Swanson, GPO refers specific printing jobs to Swanson in accordance with a prearranged schedule of charges and requirements. As each job is completed, Swanson returns it to GPO along with an invoice requesting payment. The contract allows GPO to earn prompt payment discounts on those payments which are made within a specified number of days ("the discount period") after the invoice is received. GPO has established a computerized system which assures that payments to its contractors (including Swanson) are made within the discount period.

On November 27, 1987, GPO received an IRS Notice of Levy issued pursuant to 26 U.S.C. § 6331 (1982), as amended, against Swanson for unpaid taxes and related charges in the amount of \$145,677.75. The levy covered all property and other rights of Swanson held by GPO as of the date that GPO received the levy notice. According to GPO, prior to the date that it received the levy notice, it had already received and partially processed a number of invoices from Swanson for previously completed work. For some of these invoices, processing had proceeded to the point that checks (discounted for prompt payment) had already been written, but had not yet been mailed. Other invoices had been or were about to be approved for payment and entered into the automated system to await the date upon which a check (less the prompt payment discount) would be automatically written and mailed. In addition to the invoices received *prior* to the IRS notice, several more invoices were received *after* GPO received the IRS notice, but prior to the completion of GPO's response to IRS.

GPO withheld payment on all the invoices, aggregated the amounts payable into one single payment of \$26,036.06, and sent that amount to IRS on December 16, 1987. Of this amount, \$24,048.52 represented the payment (less prompt payment discounts) of those invoices received prior to the IRS notice. The balance, \$1,987.54, represented payment (less prompt payment discounts) of those invoices received after receipt of the IRS notice.

After GPO made payment to IRS, Swanson disputed GPO's actions. Swanson has essentially two arguments. First, Swanson maintains that the IRS levy

notice could not be properly applied to *any* of the invoices upon which GPO withheld payment because it believes that *all* of the withheld payments were owed on invoices that it submitted after GPO received the levy notice. Swanson also claims that IRS informally told GPO that the levy was only intended to apply to the proceeds of a particular lawsuit (brought against the United States by Swanson) then pending before the United States Claims Court. Second, Swanson argues that, at a minimum, in order to qualify for prompt payment discounts, GPO was required to pay the withheld amounts to *someone* (either Swanson or the IRS) within the discount period. Since GPO did not, Swanson concludes that the discounts were improperly taken.

Discussion

Swanson's first argument is premised on the proposition that the levy issued pursuant to section 6331 of the Internal Revenue Code, 26 U.S.C. § 6331, did not reach the withheld payments that GPO transferred to IRS.¹ We need not dwell long on this issue since we view the transfer of funds as a setoff rather than a levy. In this regard, we agree with the holding of the First Circuit Court of Appeals in *U.S. for Use of P.J. Keating Co. v. Warren Corp.*, 805 F.2d 449, 452 (1st Cir. 1986) that the IRS' service of a notice of levy upon another government agency "does not magically transform a traditional setoff by the federal government into a levy." See also *Aetna Insurance Co. v. United States*, 456 F.2d 773, 197 Ct. Cl. 713 (1972); *Barrett v. United States*, 367 F.2d 834, 177 Ct. Cl. 380 (1966); *In Re Lanny Jones Welding and Repair Inc.*, 106 Bankr. 446 (E.D. Va. 1988); but see *United Sand and Gravel Contractors, Inc. v. United States*, 624 F.2d 733 (5th Cir. 1980). Thus, we see no merit in Swanson's first argument.

Turning to Swanson's second argument, we conclude that the amounts payable on those invoices were properly reduced by the prompt payment discounts. This Office has repeatedly held that the government may not be deprived of its right to take a prompt payment discount where the delay in payment was caused by the contractor, including, for example, where payment is withheld on account of an IRS levy notice.² These reduced amounts were then properly payable by GPO to IRS for credit on its tax claim against Swanson.

The fact that IRS did not receive the payments until after the prompt payment discount period does not affect our conclusion. We do not agree with Swanson

¹ Whenever a tax assessment remains unpaid after notice and demand, IRS may collect the tax by "levy" upon all property and rights to property belonging to the delinquent taxpayer, no matter who possesses that property. 26 U.S.C. § 6331(a) & (b) (1982), as amended by Pub. L. No. 98-369, tit. VII, § 714(o), 98 Stat. 964 (1984). With the exception of levies against wages or salary, IRS levies are not "continuous," that is, they apply only to property possessed and obligations existing at the time of the levy. Compare 26 U.S.C. § 6331(e), as amended by Pub. L. No. 100-647, tit. VI, § 6236(b)(2), (h)(1), 102 Stat. 3342, 3738, 3741 (1988). In order for IRS to levy against property acquired after the date that the levy notice is received, it must issue a new levy notice. Cf. 26 U.S.C. § 6331(c) (1982); 26 C.F.R. § 301.6331-1(a)(1) (1988).

² B-210243, Apr. 22, 1983 (The contractor's actions, including "its actions which resulted in the IRS levy . . . are the cause of the Government's delay in making the final payment in this case. [Citation omitted.] Therefore, [the government] is entitled to the [prompt payment] discount."). Cf. 18 Comp. Gen. 155, 157 (1938); B-201328, Oct. 28, 1981; B-184351, Jan. 27, 1976.

that GPO was required by the contract to pay "someone," either Swanson or IRS, within the discount period under these circumstances. Once GPO received the notice, it was prohibited from paying Swanson, and in our view, both its obligation to make payment to Swanson and the prompt payment timing provisions of the contract were superseded as a matter of law. In B-210243, Apr. 22, 1983, we allowed an agency to take a prompt payment discount under circumstances similar to those of the present case.

Where an agency of the United States is asked to set off funds, we think payment can be properly viewed as having been constructively made at the time that the agency received the setoff request. In other words, GPO effectively made payment at the moment that the levy notice, *qua* setoff, attached to the amounts that GPO otherwise owed to Swanson.³

Conclusion

Based on the foregoing, we conclude that GPO properly withheld and paid to IRS the amounts owed to Swanson on invoices received both before and after receipt of the levy notice. We also conclude that GPO was entitled to take the prompt payment discounts for those invoices which it would otherwise have earned under its contract with Swanson, but for its compliance with the IRS request for setoff, albeit one couched as a levy.

B-240148, October 19, 1990

Procurement

Special Procurement Methods/Categories

- Requirements contracts
- ■ Validity
- ■ ■ Determination

Solicitation for natural gas from wellhead producers and its transmission via the interstate pipeline to local distributing companies reasonably was found not to be a contract for utility services within the meaning of the Department of Labor's regulatory exemption from the application of the Walsh-Healey Act and thus the Walsh-Healey Act is applicable to the procurement.

³ In this respect, taking offset has often been likened to making a payment. *E.g.*, B-195066, Sept. 22, 1980 (Where the Navy offset unpaid leave rations it owed a member against advance pay the member owed the Navy, we said, "[t]he setoff effectively constituted payment of the amount due the member") See also 6 Op. Att'y Gen. 732, 743 (1854); *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913).

Procurement

Socio-Economic Policies

■ Small businesses

■ ■ Disadvantaged business set-asides

■ ■ ■ Eligibility

■ ■ ■ ■ Determination

Procuring agency properly did not set aside procurement for small disadvantaged business (SDB) concerns where the agency determined that there was no expectation of receiving offers from two or more SDBs which would be eligible for award as manufacturers/producers or regular dealers as required by the Walsh-Healey Act.

Matter of: Commercial Energies, Inc.

Gregory Kellam Scott, Esq., for the protester.

Judy K. Stewart for Union Natural Gas Pipeline Company, an interested party.

Timothy Thompson, Esq., and Louise Hansen, Esq., Defense Logistics Agency, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Commercial Energies, Inc. (CEI) protests that request for proposals (RFP) No. DLA600-90-R-0126, issued by the Defense Fuel Supply Center, Defense Logistics Agency (DLA), for the supply of natural gas, should have been set aside for small disadvantaged businesses (SDB).

We deny the protest.

The RFP was issued as a small business set-aside and contemplated the award of a fixed-price contract with economic price adjustment to provide direct supply natural gas,¹ via the interstate pipeline to the city gate at the local distribution company (LDC) for 16 government installations in Indiana and Illinois.² Offerors were informed that the supply of natural gas was considered the supply of a commodity and that the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 *et seq.* (1988), was applicable to this procurement.

CEI, an SDB concern, protests that, pursuant to the Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.502-72(a) and 219.504(b) (1988), DLA was required to set aside the RFP for SDBs since there was a reasonable expectation that offers could be obtained from at least two or more responsible SDB concerns. DLA responds that prior to the issuance of the RFP the contracting officer conducted an extensive market survey and determined that there were no SDB concerns which would be eligible for award as manufactur-

¹ The RFP defines "direct supply natural gas" as being natural gas purchased directly from producers or other sources as a commodity.

² The "city gate" is the connection between the interstate pipeline and the LDC.

ers (producers) of or regular dealers in natural gas as required by the Walsh-Healey Act.

The Walsh-Healey Act requires, among other things, that contracts for "supplies" be awarded only to manufacturers or regular dealers, *see* 41 U.S.C. § 35(a), and imposes certain employment standards on government contractors by providing that contracts made or entered into by the government for the manufacture or furnishing of materials, supplies, articles and equipment will include minimum wage requirements, child and convict labor restrictions, and work safety provisions. The Act is administered by the Secretary of Labor and implemented with regulations published at 41 C.F.R. chapter 50 (1989).

CEI argues that the Walsh-Healey Act is not applicable to this procurement because the RFP contemplated the award of a contract for utility services, which are exempt from the Act. The Secretary of Labor, pursuant to authority granted by the Walsh-Healey Act, 41 U.S.C. § 40, exempted "[c]ontracts for public utility services including electric light and power, water, steam and gas" from the application of the Act.³ *See* 41 C.F.R. § 50-201.603(a).

DLA asserts that it is not acquiring utility services in this procurement but rather natural gas as a commodity from producers or dealers. The agency explains that the production and transmission of natural gas has been deregulated, *see, e.g.,* The Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.* (1988), *as amended by* The Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989), and that this deregulation provides consumers, including the government, with the opportunity to choose whether to acquire natural gas service from the LDC, or, as here, to acquire natural gas directly from wellhead producers or dealers as a commodity.⁴ DLA contends that the supply of natural gas and its transmission through interstate pipelines are not utility services. The agency states that the installations, for which DLA is purchasing direct supply natural gas, will enter into separate public utility service contracts with the LDCs to distribute the natural gas purchased from the wellhead and received at the city gate.

DLA has submitted a letter from the Administrator of Labor's Wage and Hour Division, stating that this procurement is subject to the Walsh-Healey Act. Labor explains that public utility services were administratively exempted from application of the Walsh-Healey Act by 41 C.F.R. § 50-201.603 because public utilities were otherwise regulated and the application of Walsh-Healey's labor standard provisions was not necessary. Labor finds that the RFP here involves the "acquisition of deregulated natural gas" from producers or regular dealers and regulated utility services, and concludes that the public utility services ex-

³ The term "public utility services" is not specifically defined in the Walsh-Healey Act or in the regulations there-to.

⁴ The natural gas industry is comprised of three major segments: (1) the wellhead or production segment, in which natural gas is extracted from the ground; (2) the pipeline or transmission segment, in which the gas is transported by pipeline to the city gate; and (3) the local distribution segment, in which utility companies and/or distribution companies distribute the gas locally to commercial and residential customers. *See* Broadman and Kalt, *How Natural Is Monopoly? The Case of Bypass in Natural Gas Distribution Markets*, 6 Yale J. on Reg. 181, 182 n.11 (1989).

emption does not apply and the procurement is subject to the Walsh-Healey Act.

CEI argues that we should accord no weight to Labor's interpretation of this regulatory exemption because Labor has no authority to determine the applicability of the Walsh-Healey Act where the eligibility of small business firms is concerned. The protester contends that the Small Business Administration (SBA), pursuant to its authority to regulate small business matters, has determined that SDBs and other small business firms which supply natural gas are not subject to the Walsh-Healey Act.

The Secretary of Labor has primary responsibility for the administration of the Walsh-Healey Act. *See* 41 U.S.C. § 38; *WestByrd, Inc.*, 69 Comp. Gen. 238 (1990), 90-1 CPD ¶ 159. The Secretary has delegated the authority to promulgate regulations and issue official rulings and interpretations to the Administrator of Labor's Wage and Hour Division. 41 C.F.R. § 50-206.2. SBA, on the other hand, has the more limited authority to determine the eligibility of small business concerns as manufacturers or regular dealers under the Walsh-Healey Act. *See* 15 U.S.C. § 637(b)(7)(B) (1988); FAR § 22.608 (FAC 84-56).

CEI has not challenged DLA's statement that CEI is not a regular dealer or manufacturer. Thus, CEI's eligibility under the Walsh-Healey Act is not in issue but rather the issue is the applicability of that Act to this procurement. Accordingly, Labor's views, not SBA's, are pertinent to this case.

In dealing with the interpretation of statutes that have been committed to a federal agency for enforcement and implementation, the agency's interpretation is entitled to great deference. *See Udall v. Tallman*, 380 U.S. 1 (1964). Where construction of an administrative regulation, rather than a statute, is in issue, the agency's interpretation is deemed of controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Id.* Furthermore, remedial statutes, such as the Walsh-Healey Act, are entitled to be liberally construed, and exemptions thereto are read narrowly. *See Menlo Serv. Corp. v. United States*, 765 F.2d 805 (9th Cir. 1985).

We do not find Labor's view that the RFP is subject to the Walsh-Healey Act to be unreasonable or erroneous. 41 C.F.R. § 50-210.603 only exempts public utilities from the application of the Walsh-Healey Act. Since public utilities were exempted because they were already regulated,⁵ and the natural gas industry has been deregulated,⁶ Labor has reasonably found that wellhead producers

⁵ Similarly, the Service Contract Act, 41 U.S.C. § 356(5) (1988), statutorily exempts any "contract for public utility services, including electric light and power, water, steam and gas." The regulations interpreting this section indicate that the "exemption is applicable to contracts for such services with companies whose rates therefor are regulated under State, local and Federal law governing the operations of public utility enterprises." 29 C.F.R. § 4.120 (1989).

⁶ CEI argues that Labor erred in determining that natural gas producers were not regulated. CEI contends that while the natural gas industry has been generally deregulated, the industry is still subject to significant regulation at the federal, state, and local level. This contention is without merit. It can be taken as a given that business entities in this country are subject to regulation at some level but the regulation to which Labor refers is the regulation of public utilities. In this regard, CEI does not contend that it is a regulated public utility within the meaning of Labor's regulatory exemption to the Walsh-Healey Act.

need not be public utilities.⁷ Thus, DLA and Labor reasonably found that this RFP was for the acquisition of a commodity, not a service.

CEI argues that the RFP contemplated the performance of substantial services in addition to the supply of natural gas and thus this is a procurement for services and not supplies. In this regard, CEI states that the RFP listed Standard Industrial Classification (SIC) codes 1311 and 4924 for natural gas extraction and natural gas distribution, respectively, which it contends show that this RFP contemplated a public utility services contract.

Notwithstanding the SIC codes referenced in the RFP,⁸ the RFP does not provide for the distribution of gas to government installations. While it is true that the RFP requires the performance of services such as the processing, sampling and inspection of gas supplies, as well as its transmission via the interstate pipeline, these services are incidental to the supply of the natural gas. Thus, the RFP principally is for supply of natural gas as a commodity and not to obtain services. The inclusion of these incidental services in the RFP does not change the basic character of the acquisition. *See generally Tenavision, Inc.*, B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114.

CEI also cites DFARS Supplement No. 5 and the agreement of understanding between the General Services Administration and the Department of Defense (DOD) concerning DOD's procurement of utility services as requiring DLA to purchase gas through a public utility services contract.⁹ We disagree.

The supplement and agreement do not address the applicability of the Walsh-Healey Act, which is the issue here. Moreover, the supplement and agreement both predate the deregulation of the natural gas industry and reflect the situation then existing, which generally required the government to acquire natural gas as a utility service from an LDC. In this regard, both the supplement and the agreement define "utility services" in terms of distributing or furnishing natural gas to the ultimate user.

The RFP, however, is to obtain natural gas from producers and transmit the gas to an LDC, which will distribute the gas to the government under a separate public utility services contract. Neither the supplement nor the agreement prohibit DLA from separating the acquisition of gas supplies, and their transmission via the interstate pipeline, from a public utility services contract for the ultimate distribution of the gas.

⁷ CEI also complains of the "non-adversarial" nature of Labor's determination because CEI did not participate in the determination. CEI, however, received a copy of DLA's request to Labor for its determination in this matter and apparently chose not to participate. Accordingly, CEI's failure to provide its views to Labor provides no basis on which to object to Labor's determination.

⁸ We do not understand why the RFP referenced the SIC code for the distribution of gas. As noted by the protester, a more recently issued solicitation for the acquisition of direct supply natural gas does not mention this SIC code.

⁹ The Federal Property and Administrative Services Act, 40 U.S.C. § 481(a) (1988), grants GSA the authority to manage, procure, and supply public utility services to the government. The Act also provides that DOD may procure its own utilities services where it is in the best interest of national security. Pursuant to this authority, GSA and DOD agreed that DOD would procure its own utility services. *Procurement of Utility Services (Power, Gas, Water)*, Statement of Understanding Between Department of Defense and General Services Administration, Nov. 2, 1950, reprinted in, 15 Fed. Reg. 8227 (Dec. 1, 1950).

The protester primarily relies on our decision in 45 Comp. Gen. 59 (1965), which stated that natural "gas is by definition a utility." CEI argues that therefore any contract for the furnishing of gas is by definition a utility services contract within the meaning of the regulatory exemption to the Walsh-Healey Act.

That decision, which also predated deregulation of the natural gas industry, involved a procurement for the distribution of gas to the installation and not, as here, the production and transmission of natural gas to a distributor. Furthermore, the issue in that decision was not the applicability of the Walsh-Healey Act, but whether the procuring agency had the authority to enter into a long-term, public utility services contract under the Federal Property and Administrative Services Act, 40 U.S.C. § 481(a)(3). We found, *inter alia*, that 40 U.S.C. § 481(a)(3) was enacted to permit the government to enter into such long-term contracts as a means of effecting economy, and that this statutory provision was not restricted to contracts with regulated, public utilities. In determining what was a "utility service" within the meaning of that statute, we stated that it was the nature of the service provided and not the nature of the provider that determined the applicability of that statutory provision.¹⁰

As discussed above, the purpose of the regulatory exemption for public utilities under the Walsh-Healey Act was to excuse from the labor provisions of the Act public utility concerns which were otherwise regulated. Thus, under Labor's view, whether or not a firm should be exempt from the application of the Walsh-Healey Act depends upon the nature of the provider and not the services rendered. Accordingly, whether the acquisition of natural gas is considered to be a public utility services contract under 40 U.S.C. § 481(a)(3) is not controlling as to whether the Walsh-Healey Act is applicable. In this regard, we found in 62 Comp. Gen. 569 (1983), which also involved the application of 40 U.S.C. § 481(a)(3), that:

[T]he concept of what product or service constitutes a public utility service is not static for the purpose of statutory construction, but instead is flexible and adaptive, permitting statutes to be construed in light of the changes in technologies and methodologies for providing the product or service. Finally, it is also clear that while a particular activity may be a public utility service for the purpose of one law, the same activity may not be a public utility service for the purpose of another law. 62 Comp. Gen. *supra*, at 575. (Footnotes omitted.)

Thus, DLA and Labor reasonably found that the RFP was not to acquire public utility services within the meaning of the regulatory exemption to the Walsh-Healey Act. Therefore, offerors under the RFP were required to be manufacturers/producers or regular dealers as required by the Walsh-Healey Act to be eligible for award.

DLA found no SDB concerns which would qualify as manufacturers/producers or regular dealers in natural gas. CEI does not dispute that it is not a regular dealer or manufacturer/producer, nor has it identified other eligible SDB concerns. Accordingly, the agency acted properly in not setting this procurement aside for SDB concerns.

¹⁰ In that case, we found it doubtful that the awardee was a public utility because it was not subject to regulatory control and did not serve the public generally with natural gas.

The protest is denied.

B-230380, October 23, 1990

Military Personnel

Travel

■ **Bonuses**

■ ■ **Acceptance**

■ ■ ■ **Propriety**

■ ■ ■ ■ **Dependents**

Dependent students of a military member may retain nontransferable travel certificates received from an airline as a result of a 24-hour flight delay. General rule that discount coupons and other benefits received in the course of official travel are the property of the government does not apply in the case of benefits received by dependents of government employees or military members whose travel is paid for by the government but who are not eligible for per diem payments.

Matter of: Colonel Michael L. Carr, USAF—Carrier Travel Certificates Received by Student Dependents on Official Travel

This responds to a request for an advance decision on the question of whether dependents of an Air Force member are entitled to retain nontransferable travel certificates received from an air carrier as the result of a 24-hour flight delay experienced while traveling on official business from the United States to Japan to attend school.¹ We conclude that the dependents are entitled to retain the certificates.

Background

Colonel Michael L. Carr, USAF, sponsored three dependent children to attend school in Japan.² A travel order (AF Form 937), was issued on October 15, 1986, authorizing the dependents' transportation at government expense. Passenger tickets were issued by United Airlines for transportation from Lincoln, Nebraska, to Japan. On December 20, 1986, when the dependent students arrived in Los Angeles for a connecting flight to Tokyo, their flight was delayed 24 hours. As a result of the delay, the carrier offered and each dependent accepted non-transferable travel certificates, valued at \$100 each, which were valid toward the purchase of any fare on scheduled United Airlines flights. The dependents also were provided lodging at airline expense.

Colonel Carr's claim that his dependents should have been permitted to retain the certificates is based on the theory that the compensation for delay in the

¹ The request was made by the Accounting and Finance Officer, 18th Comptroller Squadron (PACAF), Department of the Air Force. The Per Diem, Travel and Transportation Allowance Committee assigned Control No. 88-2 to the request.

² See 20 U.S.C. § 921 *et seq.* and 32 C.F.R. Part 71 (1986), concerning dependents' education overseas.

case of his children is analogous to compensation provided for voluntarily relinquishing a seat.³ In such circumstances a traveler on official business is allowed to retain penalty payments received from carriers.

Colonel Carr cites *Charles E. Armer*, 59 Comp. Gen. 203 (1980), and various regulations which provide that travelers are allowed to retain payments resulting from voluntary relinquishment of reserved confirmed seats. He contends that his dependents' situation should be treated in the same manner. He points out the government incurred no additional expense, such as per diem or leave, since students are involved, and the travelers, rather than the government, incurred the inconvenience.

Discussion

As a general rule, discount coupons and other benefits received in the course of official travel are the property of the government, which authorizes and provides reimbursement for such travel, and may not be retained by persons engaged in official travel. See *Discount Coupons and Other Benefits Received in the Course of Official Travel*, 63 Comp. Gen. 229 (1984). Where future free or reduced cost travel is provided, agencies are expected to integrate such benefits into agency travel plans. Exceptions to the general rule have been allowed where official duty travelers implement a government policy by accepting compensation for voluntarily relinquishing confirmed seats (*Armer, supra*); where travel bonuses provide optional benefits of no use to the government, such as free upgrades to first class (*Discount Coupons, supra*); or where items of nominal value are provided (*Discount Coupons, supra*).

In *John B. Currier*, 59 Comp. Gen. 96 (1979), we dealt specifically with denied boarding compensation like that involved here, holding that the compensation received by a Forest Service employee traveling on official business belongs to the government and must be surrendered to it. We gave two reasons for this conclusion. First we said that it is the government which could be damaged by the delay in an employee's travel because it must reimburse him for any expenses associated with the delay. Second we reaffirmed our long held view that a government employee cannot, in general, be reimbursed from private sources for expenses incurred in the performance of official duties.

In our view neither rationale is applicable here. Colonel Carr's dependents, while entitled to transportation to their school at government expense, are not eligible for per diem while traveling or for reimbursement from the government for expenses incurred because of a delay in that travel. Neither are they on official government business for which compensation from private sources is improper.

³ An Air Force determination that the certificates should be surrendered to the government was sustained by our Claims Group by Settlement Certificate Z-2865145, September 21, 1987. The Air Force noted, however, that none of our decisions relating to the matter specifically considered dependent travelers.

We therefore conclude that Colonel Carr's dependents may retain the bonus coupons received by them as denied boarding compensation while traveling under circumstances which entitled them to payment by the government of only their transportation costs and not per diem or other costs of the trip.

Appropriations/Financial Management

Accountable Officers

■ Cashiers

■ ■ Relief

■ ■ ■ Physical losses

■ ■ ■ ■ Theft

Relief for the physical loss of funds due to theft is denied imprest fund cashier under 31 U.S.C. § 3527(a) (1988). The cashier failed to follow regulations requiring that the safe combination and key be stored in a secure manner, and thus was negligent. The evidence does not support a determination that the cashier's negligence did not contribute to the theft.

12

■ Disbursing officers

■ ■ Relief

■ ■ ■ Illegal/improper payments

■ ■ ■ ■ Substitute checks

When an accountable officer is issuing 4,671 replacement checks because the original checks were lost in a bulk shipment, it is premature to request relief, in advance, for any loss due to payment of both original and substitute checks. First, we cannot grant relief until a loss occurs. Second, any loss might be recovered by collection action or through a claim under the Government Losses in Shipment Act. A loss must occur and the factual record must be complete before we will address relieving liability.

9

■ Disbursing officers

■ ■ Substitute checks

■ ■ ■ Issuance

■ ■ ■ ■ Authority

The Navy has authority to waive its requirement to obtain written statements of nonreceipt from check payees before issuing successor checks. The delay in waiting for such statements will likely cause financial hardship to allotment payees. Therefore, under the circumstances in this case, a Navy Disbursing Officer's issuance of successor checks without first obtaining signed statement from original checks payees is not evidence of a lack of due care.

9

Appropriation Availability

■ Purpose availability

■ ■ Necessary expenses rule

■ ■ ■ Awards/honoraria

Employees attending regional awards ceremony sponsored by the local Federal Executive Board may be reimbursed the cost of the luncheon and related expenses under the Incentive Awards Act.

16

Appropriations/Financial Management

■ Purpose availability

■ ■ Specific purpose restrictions

■ ■ ■ Meals

Employees attending regional awards ceremony sponsored by the local Federal Executive Board may be reimbursed the cost of the luncheon and related expenses under the Incentive Awards Act.

Military Personnel

Pay

■ Set-off

■■ Military leave

Where a statute specifically refers by section number to another statute, they are interpreted as of the time of adoption, without subsequent amendments, in the absence of a contrary legislative intent. Therefore, under the current code, the salary offset provision in 5 U.S.C. § 5519 (1988) applies to amounts received by reservists and national guardsmen while on military leave to enforce the law under 5 U.S.C. § 6323(b) (1988), but salary offset does not apply to leave under 5 U.S.C. § 6323(c) (1988) for District of Columbia National Guardsmen ordered or authorized to serve in parades or encampments even though section 5519 literally refers to section 6323(c).

1

■ Survivor benefits

■■ Annuities

■■■ Eligibility

■■■■ Illegitimate children

Claims for Survivor Benefit Plan annuities submitted by the mothers of illegitimate children of two deceased retired service members are denied because neither child lived with her father in a regular parent-child relationship, as required by 10 U.S.C. § 1447(5).

25

Travel

■ Bonuses

■■ Acceptance

■■■ Propriety

■■■■ Dependents

Dependent students of a military member may retain nontransferable travel certificates received from an airline as a result of a 24-hour flight delay. General rule that discount coupons and other benefits received in the course of official travel are the property of the government does not apply in the case of benefits received by dependents of government employees or military members whose travel is paid for by the government but who are not eligible for per diem payments.

50

Miscellaneous Topics

Environment/Energy/Natural Resources

■ Regulatory agencies

■ ■ Authority

■ ■ ■ Civil penalties

■ ■ ■ ■ Mitigation

The Nuclear Regulatory Commission (NRC) lacks authority to permit licensees who violate NRC requirements to fund nuclear safety research projects in lieu of paying monetary civil penalties. *See* 42 U.S.C. § 2282(a).

Procurement

Bid Protests

- **GAO procedures**
- ■ **Protest timeliness**
- ■ ■ **Significant issue exemptions**
- ■ ■ ■ **Applicability**

Untimely protest of a solicitation's evaluation scheme will not be considered under the significant issue exception to the General Accounting Office (GAO) timeliness requirements where the issue raised in the protest has been considered on the merits by GAO in prior decisions and resolution of the issue would not be of widespread interest to the procurement community but only to the protester in this procurement. GAO will no longer invoke the significant issue exception solely because the record shows a violation of statute or regulation. 68 Comp. Gen. 473 (1989), 66 Comp. Gen. 367 (1987), and 66 Comp. Gen. 31 (1986) will no longer be followed.

38

Competitive Negotiation

- **Requests for proposals**
- ■ **Competition rights**
- ■ ■ **Contractors**
- ■ ■ ■ **Exclusion**

Protest by incumbent contractor challenging its exclusion from a limited competition for an interim contract for waste collection and disposal services is sustained where contracting agency failed to obtain maximum practicable competition by not inviting protester to respond to solicitation on the basis that the solicitation required submission of supporting cost data with proposals and protester had been unwilling to provide such data when offered an extension to its then-current contract to cover these services. The agency's exclusion of the contractor on this basis is unreasonable since such data would not have been required if adequate price competition were achieved.

4

- **Requests for proposals**
- ■ **Terms**
- ■ ■ **Service contracts**
- ■ ■ ■ **Applicability**

Protest is sustained where the procuring agency unreasonably disregarded the Department of Labor's determination that the Service Contract Act was applicable to the agency's procurement and in proceeding to receive proposals in the face of Labor's determination.

35

Procurement

Contract Management

■ Contract modification

■ ■ Cardinal change doctrine

■ ■ ■ Criteria

■ ■ ■ ■ Determination

Requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts. Where the long distance service does not differ in any technical respect from that being provided under the FTS2000 contracts, the contracts specifically provide for additional users, and the contracts cover telephone services related to official government business, including telephone calls by inmates.

20

■ Contract modification

■ ■ Cardinal change doctrine

■ ■ ■ Criteria

■ ■ ■ ■ Determination

Where agency requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts, agency is required to place orders for the service under the FTS2000 contract in the absence of an exception granted by the General Services Administration and such orders will not constitute improper sole-source procurements.

20

Contractor Qualification

■ Responsibility

■ ■ Contracting officer findings

■ ■ ■ Negative determination

■ ■ ■ ■ Criteria

Where processing bank declined to accept high bidder's credit card for the amount of his bid deposit, protest that contracting officer improperly rejected bid as nonresponsive is sustained since (1) deficiency in credit balance pertains solely to bidder's responsibility and can therefore be cured any time prior to award; (2) despite credit deficiency, government's interests were never at risk since as part of its bid, the bidder had submitted a pre-approved bid bond which insured the government against all default by the bidder, even where the bidder's instrument of payment was in a non-guaranteed form such as a credit card; and (3) prior to award, the bidder promptly cured credit deficiency with cash.

28

■ Responsibility

■ ■ Financial capacity

■ ■ ■ Contractors

Where processing bank declined to accept high bidder's credit card for the amount of his bid deposit, protest that contracting officer improperly rejected bid as nonresponsive is sustained since (1)

Procurement

deficiency in credit balance pertains solely to bidder's responsibility and can therefore be cured any time prior to award; (2) despite credit deficiency, government's interests were never at risk since as part of its bid, the bidder had submitted a pre-approved bid bond which insured the government against all default by the bidder, even where the bidder's instrument of payment was in a non-guaranteed form such as a credit card; and (3) prior to award, the bidder promptly cured credit deficiency with cash.

28

Payment/Discharge

- **Payment priority**
- ■ **Payment procedures**
- ■ ■ **Set-off**

Although IRS served notice of levy on GPO pursuant to 26 U.S.C. § 6331, we view such notice as an IRS request for GPO to set off amounts GPO owed its contractor. *U.S. for Use of P.J. Keating Co. v. Warren Corp.*, 805 F.2d 449, 452 (1st Cir. 1986). Thus, GPO properly transferred to IRS amounts owed the contractor, Swanson Typesetting Service, on invoices received both before and after receipt of the notice of levy.

41

- **Payment withholding**
- ■ **Prompt payment discounts**
- ■ ■ **Propriety**

The Government Printing Office (GPO) was entitled to take prompt payment discounts on contract payments owed to Swanson Typesetting Service but paid to the Internal Revenue Service (IRS) pursuant to notice of levy even though actual transfer of funds to IRS did not occur until after contractual payment period for prompt payment discounts. GPO may not be deprived of its right to take prompt payment discounts where payment to contractor is withheld on account of an IRS levy notice.

41

Sealed Bidding

- **Bids**
- ■ **Modification**
- ■ ■ **Interpretation**
- ■ ■ ■ **Intent**

Since property sales contemplate award being made on an item-by-item basis, where bidder sets forth in his bid deposit statement that his total contract price is "\$1,602" and that the amount of his bid deposit is "20% of Bid," subsequent facsimile modifications which contain the solicitation number, the word "modification," the date, the signature of the bidder, and a clear itemized list of new bids and corresponding bid prices reasonably can be construed to mean that the initial contract price of \$1,602 has been modified; under these circumstances, the \$1,602 figure does not limit the

Procurement

amount of bidder's deposit and contractor is entitled to award on all items for which he was high bidder.

28

Socio-Economic Policies

■ Service contracts

■ ■ Regulations

■ ■ ■ Applicability

Protest is sustained where the procuring agency unreasonably disregarded the Department of Labor's determination that the Service Contract Act was applicable to the agency's procurement and in proceeding to receive proposals in the face of Labor's determination.

35

■ Small businesses

■ ■ Disadvantaged business set-asides

■ ■ ■ Eligibility

■ ■ ■ ■ Determination

Procuring agency properly did not set aside procurement for small disadvantaged business (SDB) concerns where the agency determined that there was no expectation of receiving offers from two or more SDBs which would be eligible for award as manufacturers/producers or regular dealers as required by the Walsh-Healey Act.

44

Special Procurement Methods/Categories

■ Requirements contracts

■ ■ Validity

■ ■ ■ Determination

Solicitation for natural gas from wellhead producers and its transmission via the interstate pipeline to local distributing companies reasonably was found not to be a contract for utility services within the meaning of the Department of Labor's regulatory exemption from the application of the Walsh-Healey Act and thus the Walsh-Healey Act is applicable to the procurement.

44

■ Service contracts

■ ■ Telecommunications

Requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts. Where the long distance service does not differ in any technical respect from that being provided under the FTS2000 contracts, the contracts specifically provide for additional users, and the contracts cover telephone services related to official government business, including telephone calls by inmates.

20